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“THE SHAMEFUL WALL OF EXCLUSION” * : HOW SOLITARY CONFINEMENT FOR INMATES WITH MENTAL ILLNESS VIOLATES THE AMERICANS WITH DISABILITIES ACT

Jessica Knowles**

Abstract: Although solitary confinement is conventionally challenged under the “cruel and unusual” standard of the Eighth Amendment, this approach presents several intractable legal hurdles to successful claims. The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., and its precursor, the Rehabilitation Act, provide innovative and non-constitutional causes of action for inmates with mental illness¹ to challenge their solitary confinement. It is estimated that at least thirty percent of inmates in solitary confinement are mentally ill, a high percentage that is due to both the disproportionate number of mentally ill inmates who are isolated from the general prison population as well as the negative psychological impacts of this isolation.

Under Title II, Section 12132 of the ADA, prisoners with mental illness cannot “be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” As recognized by U.S. Supreme Court precedent and interpreted by the Department of Justice,

* Title taken from President George H.W. Bush’s remarks during the signing of the Americans with Disabilities Act: “Let the shameful wall of exclusion come tumbling down.” Press Release, The White House Office of the Press Sec’y, Remarks by the President During Ceremony for the Signing of the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* <http://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037492-remarks-by-the-president-during-ceremony-for-the-signing-of-the-americans-with-disabilities-act-of-1990.html>.

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1. A note on word choice: this Comment uses “inmates/prisoners with mental illness” and “mentally ill inmates/prisoners” interchangeably. The latter term may appear to contradict the conventions of “people-first language,” which encourages placing the person-noun first, e.g. “person with a mental illness,” to accentuate the humanity and decrease the stigmatizing disability. *See, e.g.,* John Folkins, *Resource on Person-First Language: The Language Used to Describe Individuals with Disabilities*, AM. SPEECH-LANGUAGE-HEARING ASS’N (1992), *available at* http://www.asha.org/publications/journals/submissions/person_first.htm; *cf.* Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 4 n.14 (2004) (“[T]he verdict is not yet in whether ‘disabled person’ is acceptable in lieu of a ‘people first’ term like ‘person with a disability.’ Some crip activists and academics actually choose what might be called ‘disability first’ nomenclature as an act of defiance or pride or as a matter of mere habit.” (internal citations omitted)). However, because identifying an individual as an inmate can also be considered stigmatizing, I have chosen to use these descriptors interchangeably.

the ADA protects mentally ill inmates from discrimination on the basis of their disability. This Comment will argue that prison facilities discriminate under the ADA when they (1) isolate mentally ill inmates on the basis of their disability, (2) prolong inmates' solitary confinement due to their preexisting or manifesting mental illness, or (3) fail to provide access to aids, benefits, or services to inmates with mental illness who need to be isolated for safety reasons.

INTRODUCTION

In 1996, Sam Mandez was sentenced to life in prison in Colorado for a murder he allegedly committed at the age of fourteen.² Charged as an adult, Mandez was convicted after a highly controversial trial. Several jurors later expressed belief in Mandez's innocence.³ Shortly after beginning his prison sentence, Mandez was placed in solitary confinement for non-violent, minor violations of the prison rules: making a three-way phone call and trying to open a locked bathroom door.⁴

When he entered solitary confinement, Mandez was by all accounts a mentally healthy nineteen-year-old.⁵ Today, after sixteen years in isolation, he has been variously diagnosed with schizophrenia, schizoaffective disorder, and major depressive disorder with psychotic features.⁶ He hears a female voice that tells him to hurt himself.⁷ He believes that he joined the Green Berets at the age of twelve.⁸ He has lost twenty percent of his body weight and attempted suicide three times.⁹ Even though isolation clearly contributed to Mandez's mental deterioration,¹⁰ he remained in solitary confinement for over a decade and a half because his release was contingent on "program compliance"

2. Andrew Cohen, *Half a Life in Solitary: How Colorado Made a Young Man Insane*, THE ATLANTIC (Nov. 13, 2013, 6:00 AM), <http://www.theatlantic.com/national/archive/2013/11/half-a-life-in-solitary-how-colorado-made-a-young-man-insane/281306/>.

3. *Id.*

4. *Id.*

5. AM. CIVIL LIBERTIES UNION (ACLU) OF COLO., *OUT OF SIGHT, OUT OF MIND: COLORADO'S CONTINUED WAREHOUSING OF MENTALLY ILL PRISONERS IN SOLITARY CONFINEMENT 7* (2013) [hereinafter *ACLU OF COLORADO*] (describing Sam Mandez's case under the pseudonym John Quinn).

6. Cohen, *supra* note 2.

7. *ACLU OF COLORADO*, *supra* note 5, at 8.

8. Cohen, *supra* note 2.

9. *ACLU OF COLORADO*, *supra* note 5, at 8.

10. *See* *ACLU of Colo., Out of Sight, Out of Mind—The Story of Sam Mandez*, VIMEO (2013), <http://vimeo.com/78840078> (includes an interview at 10:55 with Dr. Terry Kupers, a psychiatrist who evaluated Sam Mandez's case, who states: "This is a human rights abuse on the face of it. We've actually created the mental illness.").

and “appropriate behavior.”¹¹ Because Mandez’s mental illness prevented him from conforming his behavior, he continued to be trapped in a vicious cycle that he could not escape.¹²

Sam Mandez’s experience is not unique. The United States incarcerates more prisoners in solitary confinement than any other country in the world—an estimated 80,000 prisoners nationwide.¹³ This extreme form of isolation often lasts for years and sometimes decades.¹⁴ In Texas and California, which have the largest prison populations in the country,¹⁵ the average solitary confinement terms are roughly four and seven years, respectively.¹⁶ By contrast, the United Kingdom confines just 500 prisoners in isolation, and only for limited periods of time.¹⁷

11. Cohen, *supra* note 2 (internal quotations and citations omitted).

12. Mandez was eventually released from solitary confinement (or “administrative segregation,” or “ad seg”) in 2013, ostensibly due to the efforts of his attorneys at the ACLU of Colorado. He has since been moved to a “residential treatment program” within the correctional system, which his attorney, Rebecca Wallace, describes as “ad seg by another name.” However, due to recent legislative changes in Colorado as well as reformist leadership at the Colorado Department of Corrections, Mandez is now allowed twenty hours of out-of-cell time a week and is receiving treatment. Despite these advancements, Mandez remains severely mentally ill, which his attorneys attribute to the many years he spent in solitary confinement. See E-mail from Rebecca Wallace, Staff Attorney at the ACLU of Colo. (Feb. 19, 2015, 12:49 PST) (on file with *Washington Law Review*).

13. ACLU NAT’L PRISON PROJECT, ACLU BRIEFING PAPER: THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES 1 (2013).

14. See, e.g., Stephanie Chen, ‘Terrible Tommy’ Spends 27 Years in Solitary Confinement, CNN, <http://www.cnn.com/2010/CRIME/02/25/colorado.supermax.silverstein.solitary/> (last visited Apr. 20, 2015); Elaine Woo, *Herman Wallace Dies at 71; Ex-Inmate Held in Solitary for 41 Years*, L.A. TIMES (Oct. 8, 2013), <http://articles.latimes.com/2013/oct/08/local/la-me-herman-wallace-20131009>.

15. E. ANNE CARSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 4 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

16. FAQ, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN, <http://solitarywatch.com/facts/faq/> (last visited Apr. 20, 2015) (listing the average solitary confinement terms in Texas as “more than 4 years” and in California as 6.8 years).

17. The United Kingdom utilizes several forms of isolation for various reasons, including discipline and protection. See generally U.K. MINISTRY OF JUSTICE, PRISON SERVICE ORDER 1700, at 16 (Jul. 31, 2009), available at <http://www.justice.gov.uk/offenders/psos> (labeled “1700 – segregation (Zip 3mb)”) [hereinafter PRISON SERVICE ORDER 1700]. If an adult inmate over the age of twenty-one is found guilty of an offense, they can be placed in “cellular confinement” for up to twenty-one days. “Young adults,” defined as those inmates between the ages of eighteen and twenty, can only be segregated for a maximum of ten days. *Id.* at 21; see also *Young Adult Offenders*, JUST. (Feb. 25, 2012), <https://www.justice.gov.uk/offenders/types-of-offender/young-adult-offenders>. Youth under the age of eighteen are not subject to solitary confinement. PRISON SERVICE ORDER 1700, *supra*, at 21. “Violent or refractory” prisoners can also be isolated in “special accommodation” for safety—not punitive—purposes. *Id.* at 44. With this form of isolation, “[e]very effort must be made to keep the time a prisoner is held in Special Accommodation to a minimum, i.e. minutes rather than hours or days.” *Id.* at 47; see also Elisa Mosler, *Solitary Confinement in Great Britain: Still Harsh, But Rare*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN

The United States also imprisons a disproportionate number of mentally ill inmates in solitary confinement, also known as the “SHU” (security housing unit) or the “hole.”¹⁸ In New York State, for example, nearly one-third of the prisoners in solitary confinement have been diagnosed with either schizophrenia or bipolar disorder.¹⁹ Remarkably, the average solitary confinement sentence for New York inmates with mental illness is also six times longer than that of the general inmate population.²⁰

The reasons why mentally ill inmates are disproportionately held in isolation are threefold. First, those prisoners with preexisting mental illness may find it difficult to conform to prison regulations.²¹ They are therefore disparately placed in solitary confinement for disciplinary purposes or administrative reasons.²² Second, many prisoners who are placed in solitary confinement develop severe mental illness as a result of the extreme isolation.²³ This latter scenario is most likely what happened to Sam Mandez. As Dr. Terry Kupers, one of the foremost psychologists on the impact of solitary confinement on mental health, explained: “I am often asked whether prisoners with serious mental illness are selectively sent to punitive segregation, or whether the harsh conditions of isolation and idleness cause psychiatric decompensation in a vulnerable sub-population of prisoners. Of course, both mechanisms are in play.”²⁴ Third and lastly, mentally ill prisoners in isolation are more likely to violate prison rules, and fail the requirements of so-called “step-down” programs, thus prolonging their solitary sentences.²⁵ The

(Jan. 19, 2012), <http://solitarywatch.com/2012/01/19/solitary-confinement-in-great-britain-still-harsh-but-rare/> (noting that adult inmates may only be held in punitive segregation for a maximum of twenty-one days, and that in practice many are only placed in isolation for a matter of hours).

18. See ACLU NAT'L PRISON PROJECT, *supra* note 13, at 2 (listing the various terms used for solitary confinement).

19. HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 147 (2003).

20. *Id.* at 147–48.

21. *Id.* at 147.

22. *Id.* at 145–47.

23. Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 4, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-495), 2005 WL 539137, at *4 (noting that “[n]o study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects”).

24. Terry A. Kupers, *How to Create Madness in Prison*, in *HUMANE PRISONS* 53 (David Jones ed., 2006).

25. See, e.g., HOPE METCALF ET AL., *ADMINISTRATIVE SEGREGATION, DEGREES OF ISOLATION, AND INCARCERATION: A NATIONAL OVERVIEW OF STATE AND FEDERAL CORRECTIONAL POLICIES* 18 (2013) (“Commonly referred to as ‘Step-Down,’ ‘Intensive Management,’ or ‘Behavioral Management’ programs, these systems tie an inmate’s departure from segregation to the completion of certain goals, such as behavioral plans or classes. . . . Some systems explicitly state that

confluence of these three factors has led to high rates of mentally ill inmates being confined in isolation.²⁶

Legal challenges to prison conditions—including lawsuits challenging solitary confinement for the mentally ill—have traditionally been brought under the Eighth Amendment’s prohibition on “cruel and unusual punishment.”²⁷ However, constitutional protections have done little to prevent the proliferation of solitary confinement.²⁸ Although the Supreme Court has yet to directly address whether long-term solitary confinement violates the Eighth Amendment, most federal courts that have considered the issue have held that indefinite isolation is not cruel and unusual.²⁹

Due to the lack of constitutional protections, some prisoners and their advocates have turned to statutory alternatives, including the Americans with Disabilities Act (ADA) and its precursor, the Rehabilitation Act (collectively referred to in this Comment as the disability rights statutes) to seek relief.³⁰ For years, district courts dismissed these claims.³¹ However, in 2013 the U.S. Department of Justice (DOJ) made headlines when it found that the Pennsylvania State Correctional Institution at Cresson had violated the ADA by segregating mentally ill prisoners in solitary confinement.³² Because the DOJ is tasked with enforcing Title II

disciplinary infractions, of any kind, can extend the length [of] time in segregation.” (internal citations omitted)); *see also* *Hearing on Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences Before the Subcomm. on the Constitution, Civil Rights, and Human Rights, S. Comm. on the Judiciary*, 113th Cong. 7 (2014) (written testimony of Professor Laura Rovner, University of Denver Sturm College of Law) (describing how inmates with mental illness at the Colorado Department of Corrections must meet certain program requirements in order to be removed from solitary confinement, but “cannot progress in [a] linear fashion through the levels of the program precisely because of their mental disabilities”). Professor Rovner’s written testimony also noted that the former program for mentally ill inmates had a sixty-one percent failure rate. *Id.*

26. *See, e.g.*, HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 19, at 147, 149.

27. *See, e.g.*, U.S. CONST. amend. VIII; Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55, 55 (2012).

28. *See* Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 DENV. U. L. REV. 1, 14–15 (2012) (describing the increase in the use of solitary confinement beginning in the 1990s as described by the Human Rights Watch).

29. *Id.* at 18 n.90 (internal citations omitted).

30. *See, e.g.*, Glidden & Rovner, *supra* note 27.

31. *See, e.g.*, *Brown v. Pa. Dep’t of Corr.*, 290 F. App’x 463, 467 (3d Cir. 2008); *Norris v. Marrero*, No. 5:14-234-DCR, 2014 WL 7366224, at *4–5 (E.D. Ky. Dec. 24, 2014); *Goins v. Beard*, No. 09-1223, 2011 WL 4345874, at *11–12 (W.D. Pa. Sept. 15, 2011); *Atkins v. Cnty. of Orange*, 251 F. Supp. 2d 1225, 1232–33 (S.D.N.Y. 2003).

32. *See* Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice & David J.

of the ADA,³³ this finding was groundbreaking in the field of prison reform litigation, and several claims have since been filed on the basis of this legal theory.³⁴ However, there are currently few, if any successful cases on record, and it remains to be seen how influential the DOJ's recent interpretation of the ADA in the solitary confinement context will be to courts.³⁵

This Comment will explore the viability of this new and potentially powerful interpretation of the disability rights statutes and weigh its relative strengths and weaknesses against traditional Eighth Amendment claims. Additionally, this Comment will argue that prison facilities discriminate under the ADA when they (1) isolate mentally ill inmates on the basis of their disability; (2) prolong the isolation of inmates due to their mental decomposition in solitary confinement; and (3) fail to provide equal access to aids, benefits, and services to mentally ill inmates who need to be isolated due to safety considerations.

This argument will be advanced in several parts. Part I provides a brief background of the history of solitary confinement, the medical literature confirming the causal relationship between solitary confinement and mental illness, and the barriers to a successful Eighth Amendment challenge to solitary confinement. Part II describes the elements of a successful ADA or Rehabilitation Act claim, details the potential advantages and drawbacks of this approach, and provides a summary of recent and pending litigation. Part III proposes that future test cases should challenge the segregation of mentally ill prisoners and their prolonged isolation as violations of the disability rights statutes. Part III also argues that these cases should also challenge correctional facilities' failure to provide reasonable modifications or equal access to aids, benefits, or services to inmates isolated for valid safety reasons.

Hickton, U.S. Attorney, U.S. Attorney's Office, to Tom Corbett, Governor of Pa. (May 31, 2013), available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

33. 28 C.F.R. §§ 35.172–35.174 (2014).

34. See *infra* Part III.A.

35. See Elizabeth Alexander, “*This Experiment, So Fatal*”: *Some Initial Thoughts on Strategic Choices in the Campaign Against Solitary Confinement*, 5 U.C. IRVINE L. REV. 1, 39 (2015) (“Because of the resources and institutional prestige of the Department of Justice, if the Department pursues the potential litigation outlined in the [Cresson findings letters], that litigation could produce a potential breakthrough in the use of the ADA to protect prisoners from solitary confinement.”).

I. SOLITARY CONFINEMENT, MENTAL ILLNESS, AND THE LACK OF CONSTITUTIONAL PROTECTIONS

Inmates in solitary confinement are typically housed in small cells for twenty-two to twenty-four hours a day with very limited or no access to human contact, the outdoors, or educational resources.³⁶ Many of these cells are windowless,³⁷ with around-the-clock florescent lighting,³⁸ a poured concrete bed, and steel door.³⁹ Inmates are allowed out of their cells for only one or two hours a day for showers or recreation.⁴⁰ Such recreation time is spent either alone in an empty cell or in an encaged enclosure.⁴¹ Solitary confinement cells have been labeled “prisons within prisons.”⁴²

Solitary confinement is primarily utilized for disciplinary reasons (“disciplinary segregation”), which lasts for a set period of time, or for self-protection (“administrative segregation”), which can be indefinite.⁴³

36. See ACLU NAT’L PRISON PROJECT, *supra* note 13, at 2.

37. See HUMAN RIGHTS WATCH, ILL-EQUIPPED, *supra* note 19, at 146.

38. See, e.g., Grenning v. Miller-Stout, 739 F.3d 1235, 1237 (9th Cir. 2014) (describing the lighting conditions in administrative segregation unit at the Airway Heights Corrections Center in Washington State); Brandon Keim, *The Horrible Psychology of Solitary Confinement*, WIRED (Jul. 10, 2013, 4:10 PM), <http://www.wired.com/2013/07/solitary-confinement-2/> (describing solitary confinement in “bathroom-sized cells, under fluorescent lights that never shut off”).

39. See, e.g., *Hearing on Reassessing Solitary Confinement II*, *supra* note 25, at 3 (describing the cell conditions at the federal supermax prison, the ADX, in Florence, Colorado); Tessa Murphy, *Solitary Confinement is Cruel and All Too Usual. Why Is It Only Getting Worse?*, THE GUARDIAN (Oct. 13, 2014, 8:45 AM), <http://www.theguardian.com/commentisfree/2014/oct/13/solitary-confinement-us-prisoners-rehabilitation> (describing solitary confinement at the Pelican Bay Prison in California as a “small, dark cell, surrounded by nothing but three concrete walls, a dank toilet, a small sink, a thin mattress, a concrete slab and a perforated metal door that barely let any air in”).

40. See, e.g., Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 104 (2010); Joseph Neff, *UNC Study: Solitary Confinement Too Common, Ineffective*, NEWS & OBSERVER (Nov. 8, 2014), <http://www.newsobserver.com/2014/11/08/4306250/unc-study-solitary-confinement.html> (describing solitary confinement conditions in North Carolina, where “[i]nmates generally leave their cells, shackled and accompanied by guards, for one hour at a time several days a week for recreation or showers”).

41. See Metzner & Fellner, *supra* note 40, at 104.

42. See HUMAN RIGHTS WATCH, ILL-EQUIPPED, *supra* note 19, at 145; SOLITARY WATCH, *supra* note 16. Although this Comment primarily addresses the practice of solitary confinement within the prison context, solitary confinement is practiced within jails (pre-trial detention facilities), juvenile detention facilities, and immigration detention centers. See, e.g., Ian M. Kysel, Op-Ed., *End Solitary for Teenagers*, N.Y. TIMES, Dec. 17, 2014, at A31; Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1.

43. See, e.g., HUMAN RIGHTS WATCH, ILL-EQUIPPED *supra* note 19, at 145–46, 153; ACLU NAT’L PRISON PROJECT, *supra* note 13, at 3; METCALF ET AL., *supra* note 25, at 1 (summarizing the administrative segregation policies of forty-eight state correctional systems).

Placement in solitary is not connected to the inmates' original conviction or sentence.⁴⁴ Rather, it is entirely within the discretion of the prison administration.⁴⁵ The length of time an inmate spends in solitary depends on the facility and the reasons for segregation—it can last from days to months to years to decades.⁴⁶

As detailed in this section, solitary confinement has long been known to contribute to the mental deterioration of inmates and fell out of use by the late nineteenth century.⁴⁷ However, solitary confinement experienced a revival in the 1980s and 1990s, when it became a nation-wide practice to isolate prisoners for the purposes of punishment and protection.⁴⁸ This section will also describe how, despite persisting evidence that prolonged isolation negatively impacts the mental health of inmates,⁴⁹ courts have routinely found that its use does not violate the Eighth

44. Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 5 (2006).

45. See, e.g., N.Y. CIVIL LIBERTIES UNION, BOXED IN: THE TRUE COST OF EXTREME ISOLATION IN NEW YORK'S PRISONS 2 (2012) (finding that "[c]orrections officials have enormous discretion to impose extreme isolation as a disciplinary sanction"); *Norwood v. Vance*, 591 F.3d 1062, 1069 (9th Cir. 2010) ("[W]hen balancing the obligation to provide for inmate and staff safety against the duty to accord inmates the rights and privileges to which they are entitled, prison officials are afforded 'wide-ranging deference.'"); *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006) ("Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias beyond what is necessary for security.").

46. ACLU NAT'L PRISON PROJECT, *supra* note 13, at 2; SOLITARY WATCH, *supra* note 16.

47. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 43 CRIME & JUST. 441, 465 (2006).

48. See, e.g., Sarah Childress & Michelle Mizner, "Lock It Down": How Solitary Started in the U.S., PBS (Apr. 22, 2014, 9:43 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/locked-up-in-america/lock-it-down-how-solitary-started-in-the-u-s/>; Lance Tapley, *Bonnie Kerness: Pioneer in the Struggle Against Solitary Confinement*, SOLITARY WATCH: NEWS FROM A NATION IN LOCKDOWN (Nov. 8, 2012), <http://solitarywatch.com/2012/11/08/bonnie-kerness-pioneer-in-the-struggle-against-solitary-confinement/>.

49. See Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1451–56 (1983) (describing the psychological impact of solitary confinement on fifteen inmates at the Massachusetts Correctional Institution at Walpole); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 530 (1997) ("[D]istinctive patterns of negative effects have emerged clearly, consistently, and unequivocally from personal accounts, descriptive studies, and systematic research on solitary and punitive segregation. The studies included in this review span a period of over three decades and were conducted in locations across several continents by researchers ranging from psychiatrists to sociologists to architects."); Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM. J. OF PUB. HEALTH 442, 445–46 (2014) (demonstrating a correlation between solitary confinement and self-harm in the New York City jail system); Smith, *supra* note 47, at 488–93 (collecting historically, geographically, and methodologically diverse studies on the psychological impact of solitary confinement).

Amendment's prohibition on "cruel and unusual punishment."⁵⁰

A. *A Brief History of Solitary Confinement*

Quakers in Pennsylvania first introduced solitary confinement in the United States in the late 1700s as a social "experiment[.]"⁵¹ The practice was intended to be a humane alternative to the physical and capital punishment that was a common feature of criminal justice at the time.⁵² Quakers believed that prolonged periods of "separation and silence" would allow prisoners to reflect upon their relationship with God, and that this would promote rehabilitation.⁵³

However, it quickly became clear that solitary confinement had the opposite effect. The implementation of solitary confinement at an Auburn, New York prison created "results so dire" that the governor set free all the "survivors" after only eighteen months.⁵⁴ Alexis de Tocqueville, the French historian and political scientist, visited solitary confinement cells in the United States and concluded that this form of incarceration "devours the victim incessantly and unmercifully; it does not reform, it kills."⁵⁵ British author Charles Dickens, who was horrified by the solitary confinement cells he encountered at Philadelphia's Cherry Hill Prison, believed solitary confinement "to be immeasurably worse than any torture of the body."⁵⁶ Around the same time period, some prison officials even began claiming that the lash was more humane than solitary confinement.⁵⁷ By the 1880s, solitary confinement had fallen out of favor and was largely abandoned as a penological

50. See, e.g., *Thomas v. Rosemeyer*, 199 F. App'x 195, 198 (3d Cir. 2006); *Scarver v. Litscher*, 434 F.3d 972, 975–77 (7th Cir. 2006); *Hill v. Pugh*, 75 F. App'x 715, 720–21 (10th Cir. 2003); *Merchant v. Hawk-Sawyer*, 37 F. App'x 143, 145 (6th Cir. 2002); *Moore v. Schuetzle*, 486 F. Supp. 2d 969, 983 (D.N.D. 2007), *aff'd as modified*, 289 F. App'x 962 (8th Cir. 2008).

51. Jennifer Graber, "When Friends Had the Management It Was Entirely Different": *Quakers and Calvinists in the Making of New York Prison Discipline*, 97 *QUAKER HIST.* 19, 21 (2008).

52. *Id.* at 19, 30.

53. *Id.* at 23.

54. Smith, *supra* note 47, at 457 (quoting Albert G. Hess, *Foreward* to *REPORTS OF THE PRISON DISCIPLINE SOCIETY OF BOSTON: THE TWENTY-NINE ANNUAL REPORTS OF THE BOARD OF MANAGERS 1826–1854 WITH A MEMOIR OF LOUIS DWIGHT* xiv (1972)).

55. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 *U. PA. J. CONST. L.* 115, 118 (2008) (quoting TORSTEN ERIKSSON, *THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS* 49 (1976) (quoting *DU SYSTEME PENITENTIAIRE AUX ETATS-UNIS ET DE SON APPLICATION EN FRANCE* (1833))).

56. See Smith, *supra* note 47, at 460 (quoting CHARLES DICKENS, *AMERICAN NOTES* 146 (1985)).

57. See Graber, *supra* note 51, at 27.

measure.⁵⁸

In 1890, the U.S. Supreme Court detailed the horrifying history of solitary confinement in the decision *In re Medley*.⁵⁹ James Medley, the petitioner, challenged a Colorado statute requiring solitary confinement prior to execution.⁶⁰ The Court ruled in his favor, finding that solitary confinement was “an additional punishment of the most important and painful character”⁶¹ and therefore a violation of the Constitution’s Ex Post Facto Clause.⁶² In support of this finding, the Court noted that solitary confinement “has a very interesting history of its own,” and went on to describe the solitary confinement conditions at the Walnut Street Penitentiary in Philadelphia in 1787 and similar prisons in Massachusetts, New Jersey, and Maryland.⁶³ The Court recounted that isolated prisoners fell into a

semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.⁶⁴

The Court also recognized that the practice of solitary confinement had been generally regarded as “too severe” some “thirty or forty years ago.”⁶⁵

Although solitary confinement had fallen out of favor by the late 1800s,⁶⁶ a single event in 1983 revived the use of solitary confinement in the modern era: the murder of two prison guards at Marion Federal Prison in Marion, Illinois.⁶⁷ Following this incident, the entire prison was placed in lock-down for nearly twenty-four hours a day in what became known as the “Marion [M]odel.”⁶⁸ Norman Carlson, the director

58. See Smith, *supra* note 47, at 465.

59. 134 U.S. 160 (1890).

60. *Id.* at 162, 164.

61. *Id.* at 171.

62. *Id.* at 171–72; U.S. CONST. art. I, § 10.

63. *In re Medley*, 134 U.S. at 167–68.

64. *Id.* at 168.

65. *Id.*

66. See *id.*; Lobel, *supra* note 55, at 118.

67. See, e.g., Childress & Mizner, *supra* note 48; Justin Peters, *How a 1983 Murder Created America’s Terrible Supermax-Prison Culture*, SLATE (Oct. 23, 2013, 3:56 PM), http://www.slate.com/blogs/crime/2013/10/23/marion_prison_lockdown_thomas_silverstein_how_a_1983_murder_created_america.html.

68. Childress & Mizner, *supra* note 48.

of the Federal Bureau of Prisons at the time, justified the lock-downs, stating that “[t]here is no way to control a very small subset of the inmate population who show absolutely no concern for human life.”⁶⁹ The “Marion Model” inspired the construction of the first “supermax” (super-maximum security) prison in 1994 in Florence, Colorado.⁷⁰ Supermax prisons are individual facilities, or sections of other facilities, that are generally designed for indefinite solitary confinement and minimal contact with guards or other prisoners.⁷¹ Today there are an estimated 25,000 prisoners housed in supermax prisons across forty-four states.⁷²

This increase in the use of solitary confinement also coincided with the nationwide deinstitutionalization of mental health services and an uptick in mass incarceration.⁷³ The deinstitutionalization movement began in the 1960s with the aim of relocating the treatment of individuals with mental illness from mental health hospitals to community services.⁷⁴ These community health centers were intended to be less restrictive and more humane than hospitals.⁷⁵ As a result of deinstitutionalization, the number of mental health patients in hospitals dropped dramatically, from 559,000 patients in 1955 to 132,000 in 1980.⁷⁶ Unfortunately, the community mental health services slated to take on the influx of individuals with mental illness were both underprepared and underfunded to adequately provide services to these individuals.⁷⁷ Set adrift in their communities without sufficient mental

69. Michael Taylor, *The Last Worst Place / The Isolation at Colorado's ADX Prison Is Brutal Beyond Compare. So Are the Inmates*, SFGATE (Dec. 28, 1998, 4:00 AM), <http://www.sfgate.com/default/article/The-Last-Worst-Place-The-isolation-at-2970596.php#page-1>.

70. Gertrude Strassburger, *Judicial Inaction and Cruel and Unusual Punishment: Are Super-Maximum Walls Too High for the Eighth Amendment?*, 11 TEMP. POL. & CIV. RTS. L. REV. 199, 202–03 (2001).

71. DANIEL P. MEARS, URBAN INST. JUSTICE POLICY CTR., *EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS*, at ii (2006).

72. See ACLU NAT'L PRISON PROJECT, *supra* note 13, at 1.

73. See, e.g., Childress & Mizner, *supra* note 48 (noting that the “modern use of solitary confinement in American prisons began” in 1983); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 58 (2011) (demonstrating that the drop in the rate of deinstitutionalization of mental hospitals coincided with a rise in the rate of incarceration in the late 1970s).

74. Jonathan P. Bach, Note, *Requiring Due Care in the Process of Patient Deinstitutionalization: Toward a Common Law Approach to Mental Health Care Reform*, 98 YALE L.J. 1153, 1155–56 (1989).

75. *Id.* at 1153, 1155.

76. *Id.* at 1155–56.

77. Mark R. Pogrebin & Eric D. Poole, *Deinstitutionalization and Increased Arrest Rates Among the Mentally Disordered*, 15 J. PSYCHIATRY & L. 117, 121 (1987).

health services, many individuals with mental illness came into contact with the criminal justice system.⁷⁸ Arrest and incarceration, as opposed to treatment referral, was often the default response from law enforcement.⁷⁹ As a result, “the jail has assumed the role of delivering psychiatric services to poor, mentally disturbed offenders.”⁸⁰ Contemporaneous with this movement toward deinstitutionalization was the resurgence of solitary confinement as a means to control prison populations.⁸¹

There are two primary justifications for the proliferation of solitary confinement and supermax facilities: (1) that isolating certain inmates disrupts organized criminal activity—including gang activity⁸² and terrorism⁸³—between prison facilities and the public, and (2) that segregating the most dangerous inmates from the general prison population makes prisons safer.⁸⁴ However, studies on prison violence in Arizona, Illinois, and Minnesota indicate that opening of supermax prisons in those states has not decreased inmate-on-inmate violence in the general population facilities.⁸⁵ In California, levels of prison violence have actually increased since supermax prisons were opened to house the State’s most violent inmates.⁸⁶ Accordingly, researchers have labeled the causal relationship between the use of solitary confinement and increased prison safety to be “largely speculative.”⁸⁷ In fact, *reducing* the use of solitary confinement may actually lead to increased safety in prisons.⁸⁸ In Mississippi, a reduction in the use of solitary confinement

78. *Id.* at 118–20.

79. *Id.* at 119–20.

80. *Id.* at 122.

81. *See, e.g.*, Childress & Mizner, *supra* note 48.

82. STATE OF CAL. DEP’T OF CORR. & REHAB., SECURITY THREAT GROUP PREVENTION, IDENTIFICATION AND MANAGEMENT STRATEGY 5 (2012) (“Criminal gangs are largely responsible for criminal activities within the institutions, to include the trafficking of narcotics, committing and/or directing violence against staff and offenders, and directing criminal activity between the correctional institutions and the community.”).

83. *See* Lobel, *supra* note 55, at 131 (“[P]rison officials claim that certain gang members or leaders, prisoners who engage in violence against other prisoners, or terrorists cannot be housed in less restrictive conditions because of the danger they pose to other prisoners or prison personnel, or because they will be in communication with their violent associates outside of prison.”).

84. *See* Smith, *supra* note 47, at 443.

85. *See* ACLU NAT’L PRISON PROJECT, *supra* note 13, at 6.

86. *Id.*

87. *See* Smith, *supra* note 47, at 443 (quoting Chad. S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 CRIMINOLOGY 1341, 1371 (2003)).

88. Erica Goode, *Rethinking Solitary Confinement: States Ease Isolation, Saving Money, Lives*

led to such a decrease in prison violence that the state's super-maximum security unit was shut down.⁸⁹ The Mississippi model included a "step-down unit," where prisoners with serious mental illness were allowed access to out-of-cell time, group therapy, and peer counseling for three to six months before being introduced back into the general prison population.⁹⁰ This model resulted in an almost seventy percent drop in prisoner-on-staff and prisoner-on-prisoner incidents.⁹¹ The staff's use of force, including spraying inmates with immobilizing gas and physical "takedowns," also sharply declined.⁹² Virginia has instituted a similar program, and has consequently been able to decrease the number of inmates in solitary confinement by sixty-two percent.⁹³

Although Mississippi and Virginia have created "step-down" programs to reintegrate inmates in solitary confinement into the general prison population, several states release inmates directly from solitary confinement onto the street.⁹⁴ Some inmates who are released directly from long-term solitary confinement into the community immediately commit violent felonies.⁹⁵ In one particularly shocking case, a Colorado inmate newly released from solitary confinement onto the street killed two people in short succession, including the reform-minded Executive Director of the Colorado Department of Corrections, Tom Clements.⁹⁶ The inmate, who had spent nearly six years in solitary and exhibited signs of mental illness, forced his first victim to record him delivering a rambling message denouncing the use of isolation in prisons.⁹⁷ This

and Inmate Sanity, N.Y. TIMES, Mar. 11, 2012, at A1.

89. *Id.*

90. Terry A. Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIM. JUST. & BEHAV. 1037, 1042–43 (2009).

91. *Id.* at 1043.

92. *Id.* at 1043–44.

93. See, e.g., *Virginia Takes a Stand Against Solitary Confinement*, WASH. POST (Sept. 11, 2013), http://www.washingtonpost.com/opinions/virginia-takes-a-stand-against-solitary-confinement/2013/09/11/68903520-1733-11e3-804b-d3a1a3a18f2c_story.html.

94. See, e.g., HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA 120–22, 121 n.164 (1997) [hereinafter HUMAN RIGHTS WATCH, COLD STORAGE] (describing the release of prisoners from solitary confinement in Indiana and California into the general public).

95. *Id.* at 121 n.164 (citing anecdotal evidence of "at least a half-dozen cases of inmates released from the Pelican Bay SHU [in California] who promptly committed murder or other serious felonies" (internal citations omitted)).

96. Rick Raemisch, Op-Ed., *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014, at A25.

97. Sadie Gurman, *Evan Ebel Forced Pizza Driver to Make Recording Before His Murder*, DENV. POST (Feb. 10, 2014, 3:16 PM), http://www.denverpost.com/news/ci_25106855/evan-ebel-forced-pizza-driver-make-recording-before.

suggests that, without a step-down program to ease their transition into the general prison population or the public at large, some inmates may emerge from solitary confinement more violent than they were before.⁹⁸ As described by Dr. Stuart Grassian, a psychiatrist who has evaluated the impact of super-maximum solitary confinement, “[i]magine taking a dog that has bitten someone, and kicking and beating and abusing it in a cage for a year. Then you take that cage and you put it in the middle of a city, open it and hightail it out of there. That’s what you’re doing.”⁹⁹ Ultimately, the successes in Mississippi and Virginia and the tragedies in Colorado and elsewhere suggest that the widespread use of solitary confinement may not ultimately promote prison security or ensure the safety of the community.

B. *The Connection Between Solitary Confinement and Mental Illness*

*[The prisoner] stood at the window rocking and staring. His room was incredibly foul, reeking of feces and garbage. There was blood everywhere on the window. He had cut his hand on the edge of the window the day before and was rubbing his hand on the window again. He generally was not responsive to questions, instead just stared at his hand.*¹⁰⁰

—Dr. Dennis Koson describing a mentally ill inmate in administrative confinement at the Eastern Jersey State Penitentiary

Contemporary research has conclusively demonstrated that prolonged solitary confinement can be extremely detrimental to mental health.¹⁰¹ Although isolation affects individuals differently,¹⁰² empirical studies

98. Tim Molloy, *New York City Ends Solitary Confinement for Minors*, PBS (Dec. 19, 2014, 4:51 PM), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/stickup-kid/new-york-city-ends-solitary-confinement-for-minors/> (describing a documentary that “featured prisoners who complained that isolation was making them more violent and aggressive”).

99. See HUMAN RIGHTS WATCH, *COLD STORAGE*, *supra* note 94, at 121.

100. HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 19, at 148 (internal citations omitted).

101. See Grassian, *supra* note 49, at 1451–54; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 333–38, 343–54 (2006); Haney & Lynch, *supra* note 49, at 496–539; Kaba, *supra* note 49, at 445–46.

102. Significant factors that vary the impact of solitary confinement include the severity of sensory deprivation, the length of time in isolation, and perceptions about the intent of the isolation. See Stuart Grassian & Nancy Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J.L. & PSYCHIATRY 49, 61–62 (1985). At least one study has indicated that solitary can be beneficial for some inmates. See Maureen L. O’Keefe et al., *A Longitudinal Study of Administrative Segregation*, 41 J. AM. ACAD. PSYCHIATRY & L. 49, 56–59 (2013). However, the broader significance of this study has been questioned, as the conditions

show that solitary confinement is linked to suicidal thoughts, impaired concentration, confusion, depression, anxiety, paranoia, and hallucinations.¹⁰³ It is estimated that around thirty percent of the inmates in solitary are mentally ill.¹⁰⁴ This high percentage is due both to the disproportionate number of mentally ill inmates who are placed in disciplinary and administrative segregation, as well as the negative psychological impact of isolation.¹⁰⁵ Additionally, this negative psychological impact makes it difficult for inmates to comply with the requirements that would allow them to “earn” their way out of isolation.¹⁰⁶

Prolonged isolation is thought to aggravate pre-existing mental illness and foster mental illness in healthy individuals because it removes opportunities for “social reality testing.”¹⁰⁷ In society, individuals receive constant feedback from social interaction that enables them to assess their perceptions of reality.¹⁰⁸ The prolonged absence of this feedback in solitary leads to so-called “SHU [security/special housing unit] syndrome,”¹⁰⁹ which is characterized by anxiety, disorientation, violent thoughts, paranoia, lack of impulse control, derealization, and hallucinations.¹¹⁰ In at least one study, these symptoms disappeared after inmates were released from solitary confinement.¹¹¹

studied were not representative of solitary confinement nationwide. *See* Robert H. Berger et al., *Commentary: Toward an Improved Understanding of Administrative Segregation*, 41 J. AM. ACAD. PSYCHIATRY & L. 61, 62–63 (2013).

103. *See* Smith, *supra* note 47, at 488–93.

104. *See* ACLU NAT’L PRISON PROJECT, *supra* note 13, at 6 (internal citations omitted).

105. *See, e.g.*, Kupers, *supra* note 24 and accompanying text.

106. *See, e.g.*, Jones’El v. Berge, 164 F. Supp. 2d 1096, 1101, 1103 (W.D. Wis. 2001) (describing how “[s]eriously mentally ill inmates have difficulty following the rules necessary to advance up the level system [to be released from solitary confinement]” and referring to plaintiffs’ expert Dr. Terry Kupers’ testimony that “seriously mentally ill inmates are not capable of following the rules necessary to earn their way out of the most restrictive status”); *Hearing on Reassessing Solitary Confinement II*, *supra* note 25, at 7.

107. *See, e.g.*, Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 627 (2007) (citing 1993 and 2006 studies by Professor Craig Haney, an expert witness for the plaintiff class in the *Madrid v. Gomez* litigation, discussed *infra* notes 149–152 and accompanying text).

108. *Id.*

109. *Id.* at 628–29.

110. Grassian, *supra* note 49, at 1452–53.

111. *Id.* at 1453 (“The legal statute in Massachusetts requires relief from isolation status with closed solid steel doors for at least 24 hours each 15 days. . . . All prisoners interviewed reported a very rapid (usually within the first few hours) diminution of their symptoms during periods of relief. No correlation was apparent between severity of symptoms and the time required for them to

Prolonged solitary confinement, and the resultant mental illnesses, increase the risk of self-harm and suicide. A recent study of New York inmates who served time in solitary confinement showed that these inmates were seven times more likely to harm themselves than those who did not serve time in isolation.¹¹² Paradoxically, attempted or successful self-harm by prisoners in solitary confinement often results in additional isolation and, sometimes, disciplinary actions.¹¹³ In one example, a schizophrenic female inmate in the Northern State Prison segregation unit in Newark, New Jersey self-mutilated and attempted suicide over a dozen times in isolation.¹¹⁴ However, instead of treatment, she was sentenced to additional disciplinary and administrative segregation.¹¹⁵ Unsurprisingly, rates of suicide are extremely high among prisoners in solitary confinement.¹¹⁶ One study found that sixty-eight percent of prison suicides were committed by inmates in isolation.¹¹⁷

Treatment options for mentally ill inmates in isolation are limited, further compounding the psychological impacts.¹¹⁸ Psychotropic medications are usually less effective for those individuals in confinement, and access to medical health care professionals is restricted.¹¹⁹ Moreover, the lack of privacy in segregation units also thwarts treatment, and psychiatrists must talk to their patients through cell doors.¹²⁰ There are usually no options for rehabilitation programs or group therapies in isolation units.¹²¹ According to Dr. Kupers, “we seem to have reproduced some of the worst aspects of an earlier époque’s snake pit mental asylums in the isolation units of our modern prisons.”¹²²

subside.”).

112. See Kaba et al., *supra* note 49, at 445.

113. See HUMAN RIGHTS WATCH, ILL-EQUIPPED, *supra* note 19, at 187.

114. *Id.*

115. *Id.*

116. *Id.* at 179.

117. *Id.*

118. See Kupers, *supra* note 24, at 12.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 13.

C. *The Eighth Amendment's Inadequate Protections*

The Eighth Amendment to the U.S. Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹²³ Although history and medical research have conclusively demonstrated that solitary confinement can have severe psychological consequences, most courts have found that prolonged solitary confinement is not cruel and unusual.¹²⁴ This is in part because prisoners are required to overcome many financial and legal barriers—including statutory directives as well as judge-made law—in order to successfully challenge their isolation.¹²⁵ These substantial hurdles include the Prison Litigation Reform Act (PLRA) of 1995,¹²⁶ which was intended to reduce frivolous lawsuits by prisoners but has instead blocked many potentially valid constitutional claims from ever being decided on the merits.¹²⁷ The courts’ deference to prison officials’ offerings of “legitimate penological interests”¹²⁸ and

123. U.S. CONST. amend. VIII.

124. *See, e.g.*, Hafemeister & George, *supra* note 28, at 18.

125. *See, e.g.*, 28 U.S.C. § 1915 (2012) (requiring that *in forma pauperis* prisoners pay the full filing fee for civil actions); 42 U.S.C. § 1997e(a) (2012) (requiring that prisoners exhaust their administrative remedies before bringing an action to challenge prison conditions); *id.* § 1997e(d) (limiting the recoupment of attorney’s fees for all prisoner plaintiffs); *id.* § 1997e(e) (prohibiting civil suits by prisoners for “mental or emotional injury while in custody without a prior showing of physical injury”); *Farmer v. Brennan*, 511 U.S. 825, 832–34 (1994) (the Eighth Amendment’s prohibition on “cruel and unusual punishment” is not violated unless the defendant acted, at a minimum, with “deliberate indifference”); *Turner v. Safley*, 482 U.S. 78, 87 (1987) (prison regulations may burden prisoners’ constitutional rights for the purposes of “legitimate penological objectives”); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (government officials are protected from liability for constitutional violations if the requirements for qualified immunity are met).

126. The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 66–77 (1996) (codified throughout Titles 18, 28, & 42 of the United States Code). The Act’s official title is “The Prison Litigation Reform Act of 1995,” but it was not enacted until April 26, 1996. *Id.* Courts and scholars use both the 1995 and 1996 dates when citing the PLRA. *See, e.g.*, Ann H. Mathews, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. REV. 536, 538 n.15 (2002).

127. *See, e.g.*, *Porter v. Nussle*, 534 U.S. 516 (2002) (holding that an inmate’s claim that he was beaten by corrections officers in violation of the Eighth Amendment was barred by the PLRA’s requirement that he exhaust his administrative remedies before filing a civil rights suit); Alison M. Mikkor, *Correcting for Bias and Blind Spots in PLRA Exhaustion Law*, 21 GEO. MASON L. REV. 573, 573 (2014) (describing how a prisoner’s claim of sexual assault was dismissed on the pleadings because she had not filed a written grievance to the jail as required by the PLRA’s exhaustion requirement).

128. *See, e.g.*, *Turner*, 482 U.S. at 89 (holding that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests”); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1509–23 (2004) (describing the history of judicial deference to prison officials and the impact of *Turner*’s legitimate penological interests

the shielding of prison officials and guards from liability for constitutional violations through qualified immunity¹²⁹ also present substantial barriers. Overcoming a defense of qualified immunity requires prisoner plaintiffs to demonstrate both that the claimed constitutional right was “clearly established” and that a reasonable official or guard would have been aware of the constitutional right.¹³⁰

Additionally, while the Eighth Amendment arguably provides the strongest constitutional protections against unjust prison conditions, courts have continuously blunted the Amendment’s protections to the point that reaching a “cruel and unusual” finding is exceedingly rare.¹³¹ The U.S. Supreme Court has held that that an Eighth Amendment challenge must satisfy both a subjective and an objective test, creating an intractable legal hurdle.¹³² In *Farmer v. Brennan*,¹³³ the Supreme Court set out the standard for the subjective test, holding that plaintiffs must show that defendants acted with “deliberate indifference” to prove a constitutional violation.¹³⁴ “Deliberate indifference” is defined as more than mere negligence, requiring that prison officials are aware of a risk

test).

129. See, e.g., *Harlow*, 457 U.S. at 818 (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

130. *Id.*; see also COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER’S MANUAL 403–04 (9th ed. 2011), available at <http://www3.law.columbia.edu/hrlr/jlm/toc/>. The Jailhouse Lawyer’s Manual is “a handbook of legal rights and procedures designed for use by people in prison,” first published in 1978. *A Jailhouse Lawyer’s Manual*, HRLR, <http://www3.law.columbia.edu/hrlr/jlm/> (last visited Apr. 28, 2015). It has been disseminated to over two hundred U.S. prisons to bring those facilities into compliance with *Bounds v. Smith*, 430 U.S. 817 (1977), *id.*, which “requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Bounds*, 430 U.S. at 828.

131. See, e.g., Hafemeister & George, *supra* note 28, at 18–25 (recognizing that most courts have held that solitary confinement does not violate the Eighth Amendment and detailing the recent history of Eighth Amendment jurisprudence); Weidman, *supra* note 128, at 1505 (“Ever since the prison reform movement ended in the early 1980s, it has become increasingly difficult for inmates to challenge their conditions of confinement under the Eighth Amendment. Supreme Court rulings, statutes, and lower courts’ conservative applications of precedent have worked together to create a culture of deference that constrains federal courts from intervening in prison affairs.”). Deference to “legitimate penological interests,” coupled with a higher constitutional threshold for inmate claims, the PLRA, and lower courts’ self-regulation, has diminished the protections of the Eighth Amendment. *Id.* at 1512–29.

132. See Hafemeister & George, *supra* note 28, at 22.

133. 511 U.S. 825 (1994).

134. *Id.* at 834.

to inmate health or safety, but disregard the risk.¹³⁵ Additionally, the objective prong requires a showing that a prisoner has been deprived of a “human need”¹³⁶ or that living conditions create a “substantial risk of harm.”¹³⁷ In evaluating whether a specific punishment is objectively “cruel and unusual,” the Supreme Court has stated that this standard is not static, but is rather tied to “evolving standards of decency that mark the progress of a maturing society.”¹³⁸ Under this interpretation, the Eighth Amendment is a living standard that changes with the times—punishments that are presently accepted by society may later be deemed unconstitutional.¹³⁹

Thus far, the majority of legal challenges to solitary confinement under the Eighth Amendment have been unsuccessful. Although the Supreme Court has not directly addressed the constitutionality of long-term solitary confinement, several federal circuit courts have held that it does not rise to the level of an Eighth Amendment violation.¹⁴⁰ In *Ajaj v. United States*,¹⁴¹ the Tenth Circuit adjudicated an Eighth Amendment challenge to indefinite confinement at the ADX Florence supermax prison in Colorado, which included lock-down for twenty-three hours a day in “extreme isolation” under the glare of lights that never turned off.¹⁴² The court held that these conditions did not constitute a “significant departure from the healthy habilitative environment the state is required to provide its inmates” and thus met the constitutional requirements of the Eighth Amendment.¹⁴³ Similarly, in *Colgrove v. Williams*,¹⁴⁴ the Fifth Circuit held that a decade of solitary confinement did not violate the Eighth Amendment because it did not deprive the

135. *Id.* at 837.

136. *See* *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (human needs include “food, warmth, or exercise”).

137. *See* *Farmer*, 511 U.S. at 842–46.

138. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion).

139. The Supreme Court has routinely cited to the “evolving standards of decency” standard when finding various punishments unconstitutional under the Eighth Amendment. *See, e.g.*, *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2463 (2012) (life imprisonment for crimes committed before the age of eighteen); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (execution for child rape); *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005) (execution for crimes committed before the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (execution of the “mentally retarded”).

140. *See, e.g.*, *Ajaj v. United States*, 293 F. App’x 575 (10th Cir. 2008); *Colgrove v. Williams*, 105 F. App’x 537 (5th Cir. 2004) (per curiam).

141. 293 F. App’x 575 (10th Cir. 2008).

142. *Id.* at 582.

143. *Id.* at 582–84 (quoting *Mitchell v. Maynard*, 80 F.3d 1433, 1442 (10th Cir. 1996)).

144. 105 F. App’x 537 (5th Cir. 2004) (per curiam).

plaintiff of the “minimal measure of life’s necessities.”¹⁴⁵ There are many other examples of federal courts holding that solitary confinement lasting months or years is not inherently cruel and unusual.¹⁴⁶

Arguing that solitary confinement is unconstitutional for prisoners with mental illness has been met with only slightly more success.¹⁴⁷ A minority of federal courts have held that the incarceration of inmates with pre-existing mental illness in solitary confinement violates the Eighth Amendment.¹⁴⁸ In *Madrid v. Gomez*,¹⁴⁹ the Northern District of California held that the incarceration of mentally ill inmates and inmates “at an unreasonably high risk” of becoming mentally ill in Pelican Bay’s SHU violated the Eighth Amendment.¹⁵⁰ The court likened prolonged solitary confinement for mentally ill inmates to “the mental equivalent of putting an asthmatic in a place with little air to breathe.”¹⁵¹ However, the court also held that the “generalized psychological pain” of mentally healthy inmates in solitary confinement did not implicate the Eighth Amendment.¹⁵² In *Ruiz v. Johnson*,¹⁵³ the Southern District of Texas similarly held that Texas’s supermax prisons “clearly violate constitutional standards when imposed on the subgroup of the plaintiffs’ class made up of mentally-ill prisoners.”¹⁵⁴ The court found that solitary confinement acted as “virtual incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”¹⁵⁵ Additionally, in *Jones’El v. Berge*,¹⁵⁶ the Western District of Wisconsin granted a temporary injunction to remove mentally ill prisoners from a supermax prison,

145. *Id.* at 538 (quoting *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999)).

146. *See e.g.*, *Thomas v. Rosemeyer*, 199 F. App’x 195 (3d Cir. 2006); *Merchant v. Hawk-Sawyer*, 37 F. App’x 143 (6th Cir. 2002); *McMillan v. Wiley*, 813 F. Supp. 2d 1238 (D. Colo. 2011); *Sital v. Burgio*, 592 F. Supp. 2d 355 (W.D.N.Y. 2009); *Moore v. Schuetzle*, 486 F. Supp. 2d 969 (D.N.D. 2007), *aff’d*, 289 F. App’x 962 (8th Cir. 2008).

147. *See, e.g.*, *Jones’El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev’d on other grounds sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

148. *See, e.g.*, *Ruiz*, 37 F. Supp. 2d at 915; *Madrid*, 889 F. Supp. at 1267.

149. 889 F. Supp. 1146 (N.D. Cal. 1995).

150. *Id.* at 1267.

151. *Id.* at 1265.

152. *Id.*

153. 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev’d on other grounds sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001).

154. *Id.* at 915.

155. *Id.* at 907.

156. 164 F. Supp. 2d 1096 (W.D. Wis. 2001).

finding that “[l]acking physical and social points of reference to ground them in reality, seriously mentally ill inmates run a high risk of breaking down and attempting suicide.”¹⁵⁷

As evidenced by *Madrid, Ruiz*, and *Jones ‘El*, most successful Eighth Amendment challenges to solitary confinement for the mentally ill are class action suits.¹⁵⁸ Scholars offer several explanations for this phenomenon, including a lower causal burden and the difficulty of demonstrating a legitimate penological interest in confining an entire class to solitary confinement.¹⁵⁹ These scholars also point out that, in contrast, individual suits challenging the constitutionality of solitary confinement for the mentally ill are often unsuccessful.¹⁶⁰

Notwithstanding the minority position adopted by the courts in *Madrid, Ruiz*, and *Jones ‘El*, courts are normally reluctant to find that a prison has violated an individual mentally ill inmate’s Eighth Amendment rights by placing that individual in isolation, even when presented with the most shocking of facts.¹⁶¹ One particularly illustrative example is the Seventh Circuit’s decision in *Scarver v. Litscher*.¹⁶² Christopher Scarver, a schizophrenic inmate, mounted an Eighth Amendment challenge to his solitary confinement at a supermax prison after attempting suicide twice and cutting his head with a razor “in an effort to cut out whoever or whatever was talking and moving around inside his head.”¹⁶³ Writing for the unanimous panel, Judge Richard Posner acknowledged that “[i]t is a fair inference that conditions at Supermax aggravated the symptoms of Scarver’s mental illness” and described some of the prison’s responses to the manifestations of Scarver’s mental illness—including disciplining him for banging his head on the wall of his cell—as “bizarre.”¹⁶⁴ Ultimately, however, Judge Posner concluded that prison officials “did not know what more to do”¹⁶⁵ and held that there was no evidence that they acted with deliberate indifference.¹⁶⁶ Similarly, in *Hill v. Pugh*,¹⁶⁷ the Tenth Circuit found that

157. *Id.* at 1098.

158. See Glidden & Rovner, *supra* note 27, at 60.

159. See *id.* at 60 n.22.

160. See *id.*

161. See, e.g., *Scarver v. Litscher*, 434 F.3d 972 (7th Cir. 2006); *Hill v. Pugh*, 75 F. App’x 715 (10th Cir. 2003).

162. 434 F.3d 972 (7th Cir. 2006).

163. *Id.* at 973, 975.

164. *Id.* at 975.

165. *Id.*

166. *Id.* at 975, 977.

isolating a mentally ill inmate for twenty-three hours a day was not cruel and unusual because he had access to “minimal physical requirements—food, shelter, clothing and warmth.”¹⁶⁸ Other courts have employed analogous reasoning in denying individual prisoners with mental illness Eighth Amendment relief from prolonged isolation.¹⁶⁹

Due to the significant struggles of proving an Eighth Amendment violation, mentally ill inmates and their advocates have appealed to alternative legal protections. These alternatives include other provisions of the Constitution,¹⁷⁰ such as the Due Process Clauses of the Fifth and Fourteenth Amendments,¹⁷¹ international human rights law,¹⁷² and, more recently, the ADA and the Rehabilitation Act.¹⁷³ As the rest of this Comment will explain, the ADA and Rehabilitation Act have enormous potential to act as a “stop-gap” measure until Eighth Amendment jurisprudence evolves to offer substantial protections to mentally ill inmates in isolation.¹⁷⁴

II. A POTENTIAL SLEDGEHAMMER: THE AMERICANS WITH DISABILITIES ACT

President George H.W. Bush signed the Americans with Disabilities Act (ADA) on July 26th, 1990.¹⁷⁵ At the time, it was the largest signing

167. 75 F. App'x 715 (10th Cir. 2003).

168. *Id.* at 721 (quoting the trial record).

169. *See, e.g.,* Haggins v. Minn. Comm'r of Corr., No. 10-1002 (DWF/LIB), 2012 WL 983590, at *10 (D. Minn. Feb. 14, 2012) (holding that an inmate suffering from paranoid schizophrenia and schizoaffective disorder did not have his constitutional rights violated by three years of solitary confinement because he was seen by mental health staff once a week and received medication); Williams v. Branker, No. 5:09-CT-3139-D, 2011 WL 649845, at *2, *4 (E.D.N.C. Feb. 10, 2011) (finding no Eighth Amendment violation for an inmate who, despite a history of serious mental illness and suicide attempts, was held in solitary confinement for approximately ten years and sometimes left in isolation for weeks in his underwear without even a mattress); Farmer v. Kavanagh, 494 F. Supp. 2d 345, 369–70 (D. Md. 2007) (presuming a “general awareness within the Maryland correctional community” that placement of a mentally ill inmate in supermax confinement could cause further mental deterioration, but holding that corrections officers were at worst negligent, not deliberately indifferent).

170. The Equal Protection Clause does not provide strong protections for individuals with disabilities, as the Supreme Court has held that they can be denied equal protection of the laws so long as there is a rational basis—a very low standard. *See, e.g.,* City of Cleburne, Tex., v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985) (applying rational basis scrutiny to an equal protection claim by individuals with mental disabilities).

171. *See, e.g.,* Lobel, *supra* note 55, at 125–29.

172. *See* Hresko, *supra* note 44, at 16–24.

173. *See, e.g.,* Glidden & Rovner, *supra* note 27, at 65.

174. *See infra* Part III.

175. PETER BLANCK ET AL., DISABILITY, CIVIL RIGHTS LAW, AND POLICY: CASES AND

ceremony on record.¹⁷⁶ In his remarks, President Bush promised that the ADA would allow Americans with disabilities to “pass through once-closed doors into a bright new era of equality, independence, and freedom.”¹⁷⁷ The ADA extended the protections of the Rehabilitation Act of 1973 by creating causes of action for discrimination on the basis of disability in the workplace and private businesses.¹⁷⁸ It also confirmed that any “public entity,”¹⁷⁹ which the U.S. Supreme Court has held includes correctional facilities,¹⁸⁰ could be held accountable for violating the rights of individuals with disabilities.¹⁸¹ This watershed piece of legislation has been heralded by one disability law expert as “the All-Star team of civil rights legislation” which “sought to create sweeping change in nearly every facet of the lives of people with disabilities.”¹⁸² It was also the first time Congress expressly acknowledged that the segregation of individuals with disabilities constituted discrimination and that discrimination persisted in institutional settings.¹⁸³

A. *The Elements of a Successful ADA Claim Against a Jail or Prison*

Disability discrimination claims against jails or prisons fall under Title II of the ADA, which prohibits discrimination by any “public entity.”¹⁸⁴ Public entities are defined as “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”¹⁸⁵ In *Pennsylvania Department of Corrections v. Yeskey*,¹⁸⁶ the Supreme Court confirmed that “[s]tate prisons fall

MATERIALS 46 (2005).

176. *Id.*

177. *See* Press Release, *supra* note *.

178. Discrimination in employment settings and by private businesses is prohibited by Title I and III, respectively. *See* 42 U.S.C. §§ 12111–12117, 12181–12189 (2012).

179. *Id.* § 12131(1). The Rehabilitation Act does not refer directly to public entities, but identifies “any program or activity receiving Federal financial assistance or . . . any program or activity conducted by any Executive agency” as an accountable party. *See* 29 U.S.C. § 794(a) (2012).

180. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998).

181. 42 U.S.C. § 12132.

182. Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1808 (2005).

183. 42 U.S.C. § 12101(a)(2)–(3), (5); *see also* Ann K. Wooster, *Actions Brought Under Americans with Disabilities Act*, 42 U.S.C.A. §§ 12101 *et seq.*—*Supreme Court Cases*, 173 A.L.R. FED. 639, § 2[a] (2001).

184. 42 U.S.C. § 12132.

185. *Id.* § 12131(1)(B).

186. 524 U.S. 206 (1998).

squarely within the statutory definition of ‘public entity.’”¹⁸⁷ Federal prisons are not covered under the ADA,¹⁸⁸ but are covered under Section 504 of the Rehabilitation Act for the purposes of injunctive relief.¹⁸⁹ Private prisons may be covered under both Title II and Title III, the title that prohibits discrimination in “public accommodations.”¹⁹⁰ Given the similarity of Title II of the ADA and Section 504 of the Rehabilitation Act, plaintiffs usually bring claims under both Acts and courts often use the same analysis for Title II and Section 504 claims.¹⁹¹

Title II, Section 12132 of the ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁹² Therefore, to bring a successful claim under Title II, prisoner plaintiffs must prove that they (1) have a disability; (2) are an otherwise “qualified individual”; (3) were excluded from or denied the benefits of their jail’s or prison’s services, programs, or activities, or were otherwise discriminated against; and (4) were excluded, denied, or discriminated against on the basis of their disability.¹⁹³ To bring a successful claim under Section 504, prisoner plaintiffs must prove all of the elements of a Title II claim, as well as demonstrate that the jail or prison receives federal funding.¹⁹⁴

Disability is defined broadly under the ADA as “a physical or mental impairment that substantially limits one or more major life activities.”¹⁹⁵ Individuals who have a “record of such an impairment” or who are

187. *Id.* at 210.

188. A JAILHOUSE LAWYER’S MANUAL, *supra* note 130, at 759 (citing Cellular Phone Taskforce v. FCC, 217 F.3d 72, 73 (2d Cir. 2000)).

189. *Id.*; *see also* Lane v. Pena, 518 U.S. 187, 200 (1996) (holding that Congress did not explicitly waive sovereign immunity for monetary claims made under Section 504 of the Rehabilitation Act).

190. *See* A JAILHOUSE LAWYER’S MANUAL, *supra* note 130, at 760 (discussing the different possible disability rights claims for inmates at private prison facilities).

191. *See* Betsy Ginsberg, *Out with the New, In with the Old: The Importance of Section 504 of the Rehabilitation Act to Prisoners with Disabilities*, 36 FORDHAM URB. L.J. 713, 735–36 (2009) (“As predicted shortly after the ADA took effect, the differences between [the ADA and the Rehabilitation Act] exist more in theory than in practice. Courts have consistently found that the substantive provisions of the ADA are coextensive with those of Section 504 and have tended to analyze the claims as one.”).

192. 42 U.S.C. § 12132 (2012).

193. *See* A JAILHOUSE LAWYER’S MANUAL, *supra* note 130, at 762.

194. *Id.*

195. 42 U.S.C. § 12102(1)(A).

“regarded as having such an impairment” are also covered.¹⁹⁶ The definition of “mental impairment” includes “mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”¹⁹⁷ It also extends to alcoholics and drug addicts¹⁹⁸ who are not currently using illegal drugs.¹⁹⁹ “Major life activities” include, but are not limited to, caring for oneself, communicating, concentrating, learning, and sleeping.²⁰⁰ Some courts have also held that interacting with others meets the definition of a major life activity.²⁰¹ The precise meaning of “substantially limits” has become less important to ADA claims following the passage of the ADA Amendments Act of 2008, which stated that “the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”²⁰²

A “qualified individual” is a person who meets the “essential eligibility requirements” of a service, program, or activity.²⁰³ The Supreme Court has recognized that prisoners are not excluded from the definition of “qualified individual” simply because they are incarcerated.²⁰⁴ The Court has also recognized that nearly all aspects of prison life are a service, program, or activity. In *Yeskey*, Justice Scalia parsed the application of Title II in the prison context, concluding that “[m]odern prisons provide inmates with many recreational ‘activities,’ medical ‘services,’ and educational and vocational ‘programs,’ all of which at least theoretically ‘benefit’ the prisoners (and any of which disabled prisoners could be ‘excluded from participation in’).”²⁰⁵ *Yeskey* confirmed that the ADA’s protections extend to prisoners with disabilities.

The ADA requires that prison activities, services, and programs be administered by correctional officials “in the most integrated setting

196. *Id.* § 12103(1)(B)–(C).

197. 28 C.F.R. § 35.104(1)(i) (2014).

198. *Id.* § 35.104(1)(ii).

199. *Id.* § 35.104(5)(iii).

200. 42 U.S.C. § 12102(2)(A); *see also* 28 C.F.R. § 35.104(2) (defining “major life activities” within the broader definition of “[d]isability”).

201. *See, e.g.,* *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1234 (9th Cir. 1999). *See generally* Patrick A. Hartman, “*Interacting with Others*” as a Major Life Activity Under the Americans With Disabilities Act, 2 SETON HALL CIRCUIT REV. 139 (2005) (discussing a circuit split on the issue and arguing that “interacting with others” should be recognized as a major life activity).

202. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554.

203. 42 U.S.C. § 12131(2).

204. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998).

205. *Id.* at 210.

appropriate to the needs of qualified individuals with disabilities.”²⁰⁶ Additionally, these officials must make “reasonable modifications in policies, practices, or procedures . . . to avoid discrimination,” unless they can demonstrate that these modifications would “fundamentally alter the nature of the service, program, or activity,”²⁰⁷ or impose “undue financial and administrative burdens.”²⁰⁸ Some courts have required defendants to meet an elevated threshold to prove that a modification would be a fundamental alteration or create an undue burden.²⁰⁹ For example, in *Pierce v. County of Orange*,²¹⁰ the District Court for the Central District of California held that the County had not demonstrated that the plaintiff class’s requested modification—including physical modifications to the facilities and providing accommodating programs, services, and activities—would be a fundamental alteration or undue burden.²¹¹ The County claimed that budgetary shortfalls and security risks precluded their ability to make these modifications, and offered evidence of layoffs, hiring freezes, and testimony of a \$24 million shortfall in the sheriff’s overall budget.²¹² However, the court held that there was “little specific evidence” to demonstrate that the modifications in question would have a fiscal impact.²¹³ Similarly in *Henderson v. Thomas*,²¹⁴ the District Court for the Middle District of Alabama rejected the Alabama Department of Corrections’ claims that integrating HIV-positive inmates into the general population would diminish the quality of HIV treatment and would create an undue financial burden.²¹⁵ The court noted that the evidence demonstrated that the policy of segregation may in fact hinder treatment²¹⁶ and cost the state more than integration.²¹⁷ In a particularly sharp rebuke, the court stated that the

206. 28 C.F.R. § 35.130(d) (2014); *see also* *Olmstead v. L.C.*, 527 U.S. 581, 592 (1999).

207. 28 C.F.R. § 35.130(b)(7).

208. *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 289 n.17 (1987) (analyzing a Rehabilitation Act claim and recognizing as “well established” that an “[a]ccommodation is not reasonable if it either imposes ‘undue financial and administrative burdens’ on a grantee, or requires ‘a fundamental alteration in the nature of [the] program’” (internal citations omitted)).

209. *Henderson v. Thomas*, 913 F. Supp. 2d 1267, 1299–1309 (M.D. Ala. 2012); *Pierce v. Cnty. of Orange*, 761 F. Supp. 2d 915, 940–42 (C.D. Cal. 2011).

210. 761 F. Supp. 2d 915 (C.D. Cal. 2011).

211. *Id.* at 940–42.

212. *Id.*

213. *Id.* at 940.

214. 913 F. Supp. 2d 1267 (M.D. Ala. 2012).

215. *Id.* at 1299–1309.

216. *Id.* at 1305.

217. *Id.* at 1306, 1308.

Department's "protestations . . . expose a persistent pattern in the [Department] of maintaining the status quo on the basis of mere assumptions rather than actual investigation."²¹⁸ Therefore a prison or jail can only overcome the ADA's presumption of integration and modification with detailed and legitimate justifications.²¹⁹

B. The Advantages and Drawbacks of an ADA Claim Compared to an Eighth Amendment Claim

Two of the major hurdles to proving a constitutional claim under the Eighth Amendment—subjective intent and qualified immunity—are usually not at issue in statutory disability discrimination claims. While the Eighth Amendment requires a showing of subjective "deliberate indifference,"²²⁰ the ADA and Section 504 have no such requirement (although some courts have required a showing of deliberate indifference when a prisoner plaintiff seeks compensatory damages).²²¹ In fact, a showing of disparate impact may be enough to prove a disability rights claim.²²² Additionally, most courts to consider the issue have held that because the defendants targeted by Title II and Section 504 claims are public entities and not individuals, the defense of qualified immunity does not apply.²²³ Lastly, in some jurisdictions

218. *Id.* at 1302.

219. *See, e.g.*, Glidden & Rovner, *supra* note 27, at 65–66 ("The disability discrimination paradigm demonstrates that it is possible to place the burden of justification on the prison officials, and for this requirement to be specific.").

220. *Farmer v. Brennan*, 511 U.S. 825, 828–29 (1994).

221. *See, e.g.*, *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 89 (2d Cir. 2004).

222. *See, e.g.*, *BLANCK ET AL.*, *supra* note 175, at 410–13 (citing cases).

223. Qualified immunity is generally an individual defense that is available to government officials in civil suits for constitutional or statutory violations. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The majority of courts have held that "public entities" under Title II are not individuals, and are therefore not entitled to the defense of qualified immunity. *See, e.g.*, *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) ("In suits under Title II of the ADA . . . the proper defendant usually is an organization rather than a natural person. . . . In the main [provisions of the ADA] . . . and in this case, institutional liability is exclusive, so qualified immunity is unavailable."); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8, 1012 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146 (2000), *cert. dismissed*, 529 U.S. 1001 (2000); *Wesley v. Vaughn*, No. CIV.A. 99–1228, 1999 WL 1065209, at *4 (E.D. Pa. Nov. 18, 1999); *see also* Rachel E. Brodin, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 185–86 (2005) (referencing the ADA Practice and Compliance Manual). *Contra* *Montez v. Romer*, 32 F. Supp. 2d 1235, 1240 (D. Colo. 1999) (holding that there is no individual liability under the ADA or Rehabilitation Act, but conducting a qualified immunity analysis regardless); *Niece v. Fitzner*, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (stating that nothing in Title II prohibits suits against individuals in their official or individual capacities).

prison officials may not be able to hide behind an amorphous screen of “legitimate penological interests” to justify discrimination under the disability statutes as they would have license to do when accused of Eighth Amendment violations.²²⁴

Another significant advantage to litigating solitary confinement cases under the disability rights statutes is that prisoners with successful ADA and Rehabilitation Act claims may be entitled to fees that are not available for constitutional claims. For example, the disability rights statutes have no specific restrictions on the recovery of attorneys’ fees,²²⁵ while prisoners with successful Eighth Amendment claims are subject to the restrictions imposed by the PLRA.²²⁶ The PLRA restricts the recoupment of attorneys’ fees under 42 U.S.C. § 1988, which includes all civil rights suits brought by prisoner plaintiffs under 42 U.S.C. § 1983.²²⁷ Section 1983 in turn provides a remedy against individuals who violate the Constitution or laws “under color” of legal authority.²²⁸ Several courts have determined that because the ADA and

224. See, e.g., Glidden & Rovner, *supra* note 27, at 69 (“[T]he disability rights statutes do not render irrelevant the penological concerns of prison officials, but compared with the Eighth Amendment, the prison’s burden to demonstrate the necessity of a particular denial is both heavier and more clearly defined.”); cf. Brian Lester, *The Americans with Disabilities Act and the Exclusion of Inmates from Services in Prisons: A Proposed Analytical Approach Regarding the Appropriate Level of Judicial Scrutiny of a Prisoner’s ADA Claim*, 79 N.D. L. REV. 83, 93–103 (2003) (describing various federal circuit approaches to incorporating the *Turner* “legitimate penological interests” test, discussed *supra*, note 128, into the disability rights framework).

225. 42 U.S.C. § 12205 (2012); 29 U.S.C. § 794a (2012). *But see* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598, 601, 610 (2001) (holding that attorney’s fees for ADA claims are not available under the “catalyst theory,” “which posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct”).

226. 42 U.S.C. § 1997e(d). Prisoner disability rights claims are likely still subject to the other sections of the PLRA, including the administrative exhaustion requirement, *id.* § 1997e(a), and the restrictions on “mental or emotional injury” claims, *id.* § 1997e(e). See, e.g., JAMES C. HARRINGTON, GEORGETOWN UNIV. LAW CTR. CONTINUING LEGAL EDUC., OVERCOMING SECTION 1983 HURDLES: USING THE AMERICANS WITH DISABILITIES ACT TO RE-OPEN THE CIVIL RIGHTS DOOR AND HOLD GOVERNMENT AND POLICE ACCOUNTABLE *12 (Apr. 19, 2007), available at 2007 WL 5269445; *The Impact of the Prison Litigation Reform Act on Correctional Mental Health Litigation*, 121 HARV. L. REV. 1145, 1147–52 (2008). The “mental or emotional injury” restriction limits recovery for these harms “without a prior showing of physical injury or the commission of a sexual act.” 42 U.S.C. § 1997e(e). Although mentally ill inmates certainly suffer mental and emotional injuries in solitary confinement, this Comment argues that the solitary confinement of these inmates should be challenged as discrimination and/or an exclusion from benefits under the ADA, see 42 U.S.C. § 12132, not as a mental and emotional injury.

227. 42 U.S.C. § 1983. The PLRA’s attorney’s fees statute, 42 U.S.C. § 1997e(d), specifically restricts fee awards under 42 U.S.C. § 1988, which authorizes the recoupment of attorney’s fees for § 1983 actions.

228. *Id.*

Rehabilitation Act have their own fee recoupment statutes separate from Section 1988, the PLRA restrictions do not apply.²²⁹ Additionally, prisoner plaintiffs may also be able to recover experts' fees in successful ADA claims, but not for claims brought under Section 504 or Section 1983.²³⁰ However, there is some debate over whether compensatory damages are recoverable against state agencies under the ADA,²³¹ and the Supreme Court has held that punitive damages are not available.²³²

A disability rights approach can have disadvantages as well, including two safety exceptions that could allow prisons and jails to justify the continued solitary confinement of mentally ill prisoners.²³³ The first exception allows for a public entity to “impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities.”²³⁴ However, these requirements must be grounded in “actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.”²³⁵ Under the second exception, a jail or prison is not liable if an inmate poses a “direct threat to the health or safety of others.”²³⁶ Prisoners who are a danger to themselves are not included in this exception.²³⁷ Under the Supreme Court’s holding in *School Board of Nassau County v. Arline*,²³⁸ individualized assessments are required to substantiate direct threats. These assessments must evaluate the following four factors: (1) the nature of the risk, (2) the duration of the risk, (3) the severity of the risk, and (4) the probability of harm.²³⁹ The *Arline* factors have also been codified in the ADA regulations.²⁴⁰ Additionally, the jail or prison must also assess whether reasonable modifications will “mitigate the risk” of injury.²⁴¹

Another potential drawback is the difficulty of achieving class

229. *See, e.g.,* *Armstrong v. Davis*, 318 F.3d 965, 974 (9th Cir. 2003); *Beckford v. Irvin*, 60 F. Supp. 2d 85, 88 (W.D.N.Y. 1999).

230. *See, e.g.,* *Ginsberg*, *supra* note 191, at 727–28.

231. *See, e.g.,* *BLANCK ET AL.*, *supra* note 175, at 617.

232. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

233. 28 C.F.R. § 35.130(h) (2014) (nondiscrimination on the basis of disability in state and local government services).

234. *Id.*

235. *Id.*

236. *Id.* § 35.139(a).

237. *Id.*

238. 480 U.S. 273 (1987).

239. *Id.* at 287–88.

240. 28 C.F.R. § 35.139(b).

241. *Id.*

certification on behalf of a group of mentally ill prisoners asserting claims under the ADA and Rehabilitation Act.²⁴² In order to be certified as a class, litigants must demonstrate that “there are questions of law or fact common to the class.”²⁴³ In *Wal-Mart Stores, Inc. v. Dukes*,²⁴⁴ the Supreme Court heightened the requirements for commonality, holding that a potential class must demonstrate a “common contention” that will “resolve an issue that is central to the validity of each one of the claims in one stroke.”²⁴⁵ Because “mental illness” is not a singular diagnosis—but rather manifests and is treated in a variety of different ways—it can be difficult to formulate both a common claim of discrimination and a common solution that is appropriate for class-wide action.²⁴⁶

Additionally, some inmates may be resistant to bringing a disability rights claim due to the stigma of disclosing a mental illness.²⁴⁷ The challenge of persuading individuals to recognize or disclose their own mental illness has been well-documented in the criminal law context, particularly with regards to insanity pleas.²⁴⁸ Inmates may be worried about being labeled mentally ill by corrections officials and other inmates.²⁴⁹ Litigants may also face difficulties in proving that their mental illness is serious enough to qualify as a disability but not serious enough to preclude one’s status as a “qualified individual” for various

242. *Contra* notes 159–160, *supra*, and accompanying text (noting that most successful Eighth Amendment cases challenging the solitary confinement of mentally ill prisoners are class actions).

243. FED. R. CIV. P. 23(a)(2).

244. ___ U.S. ___, 131 S. Ct. 2541 (2011).

245. *Id.* at 2551.

246. *See, e.g.,* *Juste v. Rivera*, No. 1:12-CV-108, 2012 WL 6929137, at *2 (E.D. Tex. Dec. 14, 2012) (declining to find commonality because “each member of the proposed class had different medical problems, received different medical treatment from different providers, and had different outcomes”); *Mathis v. GEO Grp., Inc.*, No. 2:08-CT-21-D, 2012 WL 600865, at *6 (E.D.N.C. Feb. 23, 2012) (The court declined to certify a class of prisoners challenging insufficient medical treatment, finding that “[the class representative] does not challenge a concrete policy. Rather, [he] challenges a constellation of unspecified ‘organizations, systems, policies, procedures, practices, acts, and omissions.’”). *Contra* *Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr.*, No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517, at *18 (S.D. Ind. Dec. 31, 2012) (upholding the certification of a 23(b)(2) class of mentally ill prisoners in solitary confinement seeking injunctive relief for medical treatment).

247. *See, e.g.,* Justine A. Dunlap, *What’s Competence Got to Do With It: The Right Not To Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 512–14 (1997).

248. *See, e.g.,* David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant’s Objection*, 15 HASTINGS CONST. L.Q. 295, 295–96 (1988) (listing multiple reasons why a defendant may reject an insanity defense, including the risk of indefinite hospitalization, stigma, and discrimination).

249. *See generally* Robert D. Miller & Jeffrey L. Metzner, *Psychiatric Stigma in Correctional Facilities*, 22 BULL. AM. ACAD. PSYCHIATRY & L. 621 (1994) (describing the impact of mental illness stigma in correctional systems).

programs and activities.²⁵⁰ To be a qualified individual, one must “meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities.”²⁵¹ One scholar has identified this as the “I’m ok/I’m not ok” litigation strategy problem.²⁵²

Lastly, the question of whether Title II of the ADA properly abrogated state sovereign immunity remains unresolved.²⁵³ Under the Eleventh Amendment, states have sovereign immunity from suits filed by individuals,²⁵⁴ although Congress can abrogate this immunity through statute.²⁵⁵ The Supreme Court has been cautious to embrace all of Title II as properly abrogating state sovereign immunity, favoring a more piecemeal approach.²⁵⁶ Therefore, for both claims against state entities and individuals sued in their official capacity for monetary damages,²⁵⁷ litigants should carefully monitor this rapidly changing area of law.²⁵⁸

C. *Cracks in the Wall: Pending Litigation Challenging the Isolation of Mentally Ill Inmates as a Violation of the Disability Rights Statutes*

In *Olmstead v. L.C.*,²⁵⁹ the Supreme Court recognized that the “unjustified isolation” of the mentally ill in a medical setting is

250. Michelle Parikh, Note, *Burning the Candle at Both Ends, and There Is Nothing Left for Proof: The Americans with Disabilities Act’s Disservice to Persons with Mental Illness*, 89 CORNELL L. REV. 721, 749 (2004).

251. 42 U.S.C. § 12131(2) (2012). Programs and activities can include recreation, medical care, educational opportunities, and job training. *See, e.g.*, Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

252. *See* Parikh, *supra* note 250, at 749.

253. *See, e.g.*, Alexander, *supra* note 35, at 34.

254. U.S. CONST. amend. XI; *see also* Hans v. Louisiana, 134 U.S. 1, 16 (1890).

255. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55–57 (1996) (recognizing that Congress can abrogate states’ sovereign immunity through explicit language); *see also id.* at 59 (confirming that such abrogation is proper if supported by Section Five of the Fourteenth Amendment).

256. *See, e.g.*, United States v. Georgia, 546 U.S. 151, 159 (2006) (holding that Title II abrogated sovereign immunity where the alleged unlawful conduct actually violates the Fourteenth Amendment); Tennessee v. Lane, 541 U.S. 509, 518, 533–34 (2004) (holding that Title II abrogated state sovereign immunity with regard to access to the courts).

257. Suits against individuals in their official capacities are treated as suits against the state for the purposes of state sovereign immunity. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991). However, suits against individuals in their official capacities for injunctive relief are not barred by sovereign immunity. *Ex parte* Young, 209 U.S. 123, 159–60 (1908). Suits against local governments are also not barred by sovereign immunity. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 701 (1978).

258. *See, e.g.*, JAILHOUSE LAWYER’S MANUAL, *supra* note 130, at 783.

259. 527 U.S. 581 (1999).

discrimination under the ADA.²⁶⁰ *Olmstead* concerned the confinement of mentally ill and mentally disabled women in psychiatric hospitals in Georgia.²⁶¹ Although their treating psychiatrists had determined that they could be treated in a community setting, they remained institutionalized.²⁶² Justice Ginsburg, writing for the majority, held that the ADA explicitly prohibited the discriminatory segregation and isolation of individuals with disabilities.²⁶³ Ginsburg rested her analysis on two “evident judgments”²⁶⁴: that the segregation of those with disabilities “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,”²⁶⁵ and that “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment.”²⁶⁶ She concluded that individuals with mental disabilities are entitled to appropriate community-based treatment, so long as they do not oppose such treatment and there are resources available from the states to accommodate them.²⁶⁷

At least two cases have applied *Olmstead*'s reasoning to the prison context. In *Henderson v. Thomas*,²⁶⁸ the District Court for the Middle District of Alabama held that HIV-positive inmates could not be categorically segregated from the general prison population,²⁶⁹ citing *Olmstead* in its analysis.²⁷⁰ The plaintiffs in *Henderson* were HIV-positive inmates who were segregated in isolated housing from the

260. *Id.* at 597.

261. *Id.* at 593.

262. *Id.*

263. *Id.* at 600 (“Congress not only required all public entities to refrain from discrimination, see 42 U.S.C. § 12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified ‘segregation’ of persons with disabilities as a ‘for[m] of discrimination.’ See § 12101(a)(2) (‘historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem’); § 12101(a)(5) (‘individuals with disabilities continually encounter various forms of discrimination, including . . . segregation’).” (alterations in original)).

264. *Id.* at 600.

265. *Id.*

266. *Id.* at 601.

267. *Id.* at 607.

268. 913 F. Supp. 2d 1267 (M.D. Ala. 2012).

269. *Id.* at 1318.

270. *Id.* at 1288.

general prison population.²⁷¹ Some were even required to wear white arm bands to designate their status.²⁷² The court held that this form of isolation, if maintained without an individualized assessment of the risk of HIV transmission, constituted a violation of the ADA and Rehabilitation Act.²⁷³ Further in *Stiles v. Judd*,²⁷⁴ the Middle District of Florida denied a motion to dismiss an ADA claim²⁷⁵ made by the surviving spouse of an inmate who had committed suicide in isolation.²⁷⁶ The court found that the complaint sufficiently alleged that the inmate “was unjustifiably isolated from other prisoners on the basis of his mental illness,” citing *Olmstead*.²⁷⁷ The case ultimately settled.²⁷⁸

Despite these analogous cases, few, if any, litigants have successfully invoked the disability rights statutes to challenge the solitary confinement of prisoners with mental illness.²⁷⁹ There have been several recent cases filed attempting to advance the theory that isolating mentally ill inmates constitutes disability discrimination,²⁸⁰ and the DOJ

271. *Id.* at 1280–82.

272. *Id.* at 1282.

273. *Id.* at 1287–89 (“The court agrees that ‘segregation’ is an uncomfortable term, loaded with implications of prejudice. The court also finds that it is an appropriate way to describe the policy at issue here. Mandatory separate housing in a separate dorm . . . would doubtlessly violate the ADA if unjustified.”).

274. *Stiles v. Judd (Stiles I)*, No. 8:12-cv-02375-T-27EAJ, 2013 WL 6185404 (M.D. Fla. Nov. 25, 2013).

275. *Id.* at *1–3.

276. The facts of this case are described in another opinion in the same case. *See Stiles v. Judd (Stiles I)*, No. 8:12-cv-02375-T-27EAJ, 2013 WL 4714402, at *1–2 (M.D. Fla. Aug. 30, 2013).

277. *Stiles II*, 2013 WL 6185404, at *2.

278. *Stiles v. Judd*, No. 8:12-cv-02375-T-27EAJ (M.D. Fla. Mar. 17, 2014) (docket).

279. Ironically, at least one court has held that failing to separate mentally ill inmates from the general prison population constitutes a violation of the ADA. In *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997), the District Court of the Virgin Islands held that housing a physically disabled inmate with a group of mentally ill inmates placed the physically disabled inmate at “unnecessary and unwarranted risk of personal injury” on the basis of his disability. *Id.* at 741. The same court also found that “[f]ailure to house mentally ill inmates apart from the general prison population also violates the constitutional rights of both groups. . . . Commingling the two populations increases the level of tension among all prisoners and endangers the well-being of the mentally ill who suffer from retaliation.” *Id.* at 738–39. *Carty* was decided prior to the Supreme Court’s decision in *Olmstead*, which held that the “unjustified isolation” of the mentally ill violated the ADA. *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999). Another court has held that placing mentally ill inmates in solitary confinement for violent and self-destructive behavior does not constitute discrimination under the disability rights statutes if non-mentally ill inmates are also placed in isolation for this same behavior. *See Atkins v. Cnty. of Orange*, 251 F. Supp. 2d 1225, 1232 (S.D.N.Y. 2003) (“With no allegation of disparate treatment, no claim for discrimination under the ADA or Rehabilitation Act lies.”).

280. *See, e.g., Anderson v. Colorado*, 887 F. Supp. 2d 1133 (D. Colo. 2012); Plaintiffs’ Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing

has also clearly interpreted the ADA as protecting prisoners who are placed in solitary confinement on the basis of their mental illness.²⁸¹ The following Section will describe the chronology of recent case law, including pending cases.

1. *The Disability Discrimination Theory Emerges: Pro Se Litigants and Anderson*

Mentally ill prisoners representing themselves pro se have been claiming that isolation violates their rights under the disability rights statutes for years. However, there have been few, if any, successful cases, with most courts dismissing prisoners' claims for failing to properly articulate the grounds for their complaints.²⁸² Cases brought by advocates have also been similarly unsuccessful.²⁸³

In one particularly well-documented case, the Civil Rights Clinic at the University of Denver brought a discrimination claim on behalf of Troy Anderson,²⁸⁴ a mentally ill inmate at the Colorado State Penitentiary (CSP) who had been in solitary confinement for over ten years.²⁸⁵ Anderson, who was adopted as an infant, began having suicidal thoughts at age ten—the same year he fired a gun into a waterbed.²⁸⁶ During his teenage years, he spent two years in a lockdown unit at a psychiatric hospital.²⁸⁷ His rap sheet—both in and out of prison—is long and bizarre, involving stacks of assaults, escape attempts, and multiple shoot-outs with police.²⁸⁸ He is currently serving a seventy-five year sentence.²⁸⁹ At CSP, prison health officials responsible for evaluating

and Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, No. 2:90-cv-00520-LKK-DAD (E.D. Cal. Jan. 21, 2014), ECF No. 4985 [hereinafter *Coleman Post-Trial Brief*]; Class Action Complaint for Injunctive and Declaratory Relief, *G.F. v. Contra Costa Cnty.*, No. C13-3667-SBA (N.D. Cal. Aug. 8, 2013) [hereinafter *G.F. Complaint for Injunctive and Declaratory Relief*]; Plaintiff's Amended Complaint, *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM (D. Colo. Nov. 19, 2012), ECF No. 62 [hereinafter *Sardakowski Complaint*].

281. See Letter from Thomas E. Perez, *supra* note 32, at 31–37.

282. See, e.g., *Brown v. Pa. Dep't of Corr.*, 290 F. App'x 463, 467 (3d Cir. 2008); *Norris v. Marrero*, No. 5:14-234-DCR, 2014 WL 7366224, at *4–5 (E.D. Ky. Dec. 24, 2014); *Goins v. Beard*, No. 09-1223, 2011 WL 4345874, at *11–12 (W.D. Pa. Sept. 15, 2011).

283. See, e.g., *Atkins v. Cnty. of Orange*, 251 F. Supp. 2d 1225, 1232–33 (S.D.N.Y. 2003).

284. See Complaint, *Anderson v. Colorado*, 887 F. Supp. 2d 1133 (D. Colo. May 3, 2010) (No. 1:10-cv-01005-WYD) [hereinafter *Anderson Complaint*].

285. Glidden & Rovner, *supra* note 27, at 69.

286. Alan Prendergast, *Head Games*, DENV. WESTWORD (Sept. 21, 2006), <http://www.westword.com/2006-09-21/news/head-games/>.

287. *Id.*

288. *Id.*

289. *Id.*

Anderson have “toss[ed] out diagnoses like confetti,” variously labeling him as having schizoaffective disorder, post-traumatic stress, several personality disorders, bipolar disorder, obsessive compulsive disorder, and possible frontal lobe injuries.²⁹⁰ The complaint filed by the Civil Rights Clinic on his behalf alleged that CSP staff had denied Anderson prescribed medication, as well as “denied [him] the ability to progress out of segregation, based on behavior that is the direct result of his disability.”²⁹¹

In the resulting litigation, *Anderson v. Colorado*,²⁹² Anderson’s attorneys, Brittany Glidden and Laura Rovner,²⁹³ argued that CSP’s policies and procedures were detrimental to Anderson’s mental health and that CSP was denying him access to the opportunities that would allow him to progress out of segregation.²⁹⁴ Recognizing that a “traditional approach” would have relied singularly on an Eighth Amendment challenge to Anderson’s solitary confinement,²⁹⁵ Glidden and Rovner crafted an alternative approach, arguing that the conditions of solitary confinement were not “reasonable accommodations” of Anderson’s mental illness under the ADA and Rehabilitation Act,²⁹⁶ and also violated the Eighth Amendment.²⁹⁷ They challenged each restrictive condition of isolation, but did not request his release to the general prison population.²⁹⁸ This was done in part because Anderson was afraid that, if he was placed in the general prison population without treatment, he would violently lash out at other prisoners.²⁹⁹ Glidden and Rovner challenged each denial of access individually, including the facility’s denial of Anderson’s requests for contact visits with his family, reading materials, and correspondence courses.³⁰⁰ Their strategy was to “parse ‘solitary confinement’ into its elements and remove those that were not justified by safety or another legitimate interest.”³⁰¹ Although they

290. *Id.* (quoting retired forensic psychiatrist John Macdonald).

291. Anderson Complaint, *supra* note 284, at 4.

292. 877 F. Supp. 2d 1133 (D. Colo. 2012).

293. These attorneys are also the authors of *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners*. See Glidden & Rovner, *supra* note 27.

294. *Anderson*, 877 F. Supp. 2d at 1138.

295. See Glidden & Rovner, *supra* note 27, at 70.

296. See Anderson Complaint, *supra* note 284, at 35–36.

297. *Id.* at 34–35.

298. See Glidden & Rovner, *supra* note 27, at 69–70.

299. *Id.*

300. *Id.* at 73–74.

301. *Id.* at 70.

conceded that Anderson's isolation was necessary for safety, they argued that denying him other "benefits" afforded the general prison population was "punitive and discriminatory" as opposed to required for safety.³⁰²

However, the court ultimately did not reach the merits of many of the ADA and Rehabilitation Act claims.³⁰³ On those ADA and Rehabilitation Act claims that remained—challenging the denial of medication and treatment—the court held that Anderson had failed to establish violations of the disability rights statutes.³⁰⁴ The court reasoned that "it is not the Court's place to second guess the judgment of health care professionals who seem both capable and sincerely committed to making [the prison's mental illness program] work in general and for Mr. Anderson."³⁰⁵ The court did find that Anderson's Eighth Amendment rights had been violated,³⁰⁶ and ordered CSP to allow him access to outdoor exercise and medication.³⁰⁷ Although the disability rights claims were not successful in *Anderson*, the case is notable for its innovative approach.

2. *A Tipping Point: The Department of Justice's Cresson Findings Letter*

Under Title II of the ADA, the DOJ has the authority to monitor state and federal prisons and seek relief for violations.³⁰⁸ In May 2013, the DOJ announced in a findings letter that the Pennsylvania State Correctional Institution at Cresson had violated Title II, Section 12132 of the ADA by placing prisoners with mental illness and mental disabilities in solitary confinement.³⁰⁹ The DOJ revealed in its findings letter that Cresson "Unnecessarily Segregates and Isolates Prisoners with Disabilities and Fails To Reasonably Modify its Policies and Practices,"³¹⁰ and also "Fails to Properly Assess Prisoners on an Individual Basis To Determine Whether Segregation Is Appropriate Housing."³¹¹ The DOJ did concede that it was necessary to remove some

302. *Id.*

303. *Id.* at 74 n.87.

304. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1145, 1148 (D. Colo. 2012).

305. *Id.* at 1147.

306. *Id.* at 1142, 1145.

307. *Id.* at 1157.

308. 42 U.S.C. §§ 12131–12134 (2012); 28 C.F.R. §§ 35.172–35.174 (2014).

309. See Letter from Thomas E. Perez, *supra* note 32, at 1.

310. *Id.* at 32.

311. *Id.* at 34.

mentally ill prisoners from the general prison population, but concluded that Cresson had violated the ADA by denying these isolated prisoners access to treatment or other programs or services.³¹²

The factual findings of the letter provided several case studies of discrimination. These case studies included a description of “OO,” a schizophrenic inmate with an IQ of 55 who had been disciplined with more than 3.5 years of segregation.³¹³ The vast majority of this discipline resulted from “OO’s” failure to stand for count, although his clinical record indicates that he did not even realize he was incarcerated until after he had taken medication for several weeks.³¹⁴ In another illustrative example, “PP,” a mentally disabled inmate with anxiety and antisocial personality disorder, was sentenced to thirty days of disciplinary time in segregation for attempting suicide.³¹⁵ “PP” was also charged \$24.12 for the towel he attempted to kill himself with.³¹⁶ The letter connected Cresson’s use of solitary confinement with the increased destabilization of inmates with mental illness.³¹⁷ The letter also noted that most of the attempted suicides at the facility occurred in isolation units.³¹⁸

Before the results of the DOJ’s investigation were revealed, the state of Pennsylvania decided to close Cresson and transfer inmates to another facility.³¹⁹ Shortly after the publication of the letter, the DOJ’s interpretation of the ADA attracted wide media attention.³²⁰ Since the release of the findings letter, the DOJ has expanded its investigation to the entire Pennsylvania Department of Corrections,³²¹ finding similar

312. *Id.* at 37.

313. *Id.* at 36.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 1–2.

318. *Id.* at 2.

319. *See id.*, at 4–5; Karen Langley, *Feds Investigate Treatment of Mental Health Inmates at Cresson State Prison*, PITTSBURGH POST-GAZETTE (May 31, 2013, 7:57 PM), <http://www.post-gazette.com/local/region/2013/05/31/Feds-investigate-treatment-of-mental-health-inmates-at-Cresson-state-prison/stories/201305310184>.

320. *See e.g.*, Jessica Hathaway, *Justice Department Determines PA Prison Violated Inmate Civil Rights*, EXAMINER.COM (June 1, 2013, 5:28 PM), <http://www.examiner.com/article/justice-department-determines-pa-prison-violated-inmate-civil-rights>; Susan Jones, *DOJ Using ADA to Get Psychotic Prisoners Out of Solitary*, CNSNEWS.COM (June 3, 2013, 9:28 AM), <http://cnsnews.com/news/article/doj-using-ada-get-psychotic-prisoners-out-solitary>.

321. *See* Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep’t of Justice & David J. Hickton, U.S. Attorney, U.S. Attorney’s Office, to Tom Corbett, Governor of Pa. (Feb. 24, 2014), available at http://www.justice.gov/crt/about/spl/documents/pdoc_finding_2-24-14.pdf.

violations of the ADA,³²² and submitted statements of interest in two highly relevant cases: *Coleman v. Brown*³²³ in 2013,³²⁴ and *G.F. v. Contra Costa County*³²⁵ in 2014.³²⁶ The following Section will discuss these cases and other ongoing litigation challenging the isolation of mentally ill inmates as a violation of the disability rights statutes.

3. *Pending Litigation: Coleman, Contra Costa County, and Sardakowski*

There are at least three ongoing cases that advance the theory that placing mentally ill inmates in solitary confinement violates the disability rights statutes—*Coleman, Contra Costa County, and Sardakowski v. Clements*.³²⁷ *Coleman* has resulted in sweeping policy changes across the entire state of California,³²⁸ and the other two cases are currently in settlement negotiations.³²⁹ Although these three cases represent important advancements, there is currently little, if any, case precedent recognizing that solitary confinement for mentally ill inmates violates the disability rights statutes.

Coleman v. Brown is a seminal class action prisoners' rights case that has been ongoing since 1990.³³⁰ The class alleged that the lack of access

322. *Id.* at 17–22.

323. Complaint, *Coleman v. Brown*, No. 2:90-cv-00520 (E.D. Cal. Apr. 23, 1990).

324. Statement of Interest of the United States of America, *Coleman v. Brown*, No. 2:90-cv-00520-LKK-JFM (E.D. Cal. Aug. 9, 2013) [hereinafter *Coleman* Statement of Interest].

325. Complaint for Injunctive and Declaratory Relief, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. Aug. 8, 2013).

326. Statement of Interest of the United States of America, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. Feb. 13, 2014) [hereinafter *Contra Costa County* Statement of Interest].

327. Sardakowski Complaint, *supra* note 280. A fourth case filed shortly after the DOJ letter, *Stiles v. Judd*, discussed *supra* note 278, settled in March 2014.

328. *Coleman v. Brown*, No. CIV. S-90-520 LKK/DAD (PC), at 4–5 (E.D. Cal. Aug. 29, 2014); see Sam Stanton & Denny Walsh, *California Prisons to Dramatically Alter Treatment for Mentally Ill Inmates*, SACRAMENTO BEE (Aug. 29, 2014), <http://www.sacbee.com/news/politics-government/article2608166.html>.

329. Minute Entry, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. Mar. 31, 2015) (docket) (showing a partial settlement on February 26, 2015 and the last entry on the docket as of May 5, 2015 as a minute entry regarding a settlement conference); Minute Entry, *Sardakowski v. Clements*, No. 1:12-cv-01326-RBJ-KLM (D. Colo. Dec. 16, 2014) (docket) (showing the last entry on the docket as of May 5, 2015 as a minute entry regarding a settlement conference).

330. See *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 898 (E.D. Cal. & N.D. Cal. 2009). The *Coleman* case is also intertwined with the *Brown v. Plata*, __U.S.__, 131 S. Ct. 1910 (2011), litigation, in which the Supreme Court held that the overpopulation of California jails violated the Eighth Amendment and ordered the state to reduce its prison population to 137.5% of design capacity within two years. *Id.* at 1923, 1947. See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013)

to mental health care in California state prisons violated the Eighth Amendment and was awarded a permanent injunction in 1995.³³¹ In 2014, nearly twenty years into the injunction, the prisoner class protested that the constitutional violations still persisted, alleging that the California Department of Corrections and Rehabilitation (CDCR) “continue[s] to vastly overuse and over-rely on segregation . . . refusing to implement straightforward, well-established measures to reduce the suffering and death of class members.”³³²

In August 2013, the DOJ filed a statement of interest in the *Coleman* litigation, asking “to bring to this Court’s attention” the DOJ’s recent factual and legal findings at Cresson regarding the disability rights statutes.³³³ The class’s attorneys also cited the DOJ findings letter in their reply brief, noting the “striking parallels” between the solitary confinement practices at Cresson and throughout the entire California corrections system.³³⁴ In August 2014, the CDCR submitted a new and comprehensive state-wide mental health policy to the court, including proposals for new units, more out-of-cell time, and better mental health treatment.³³⁵ Michael Bien, one of the lead attorneys for the prisoner class, remarked that “[t]here was a different atmosphere during the negotiations with Corrections on these modifications. We felt we were listened to We felt there was an acknowledgment that the old ways were not effective, and even dangerous for the inmates.”³³⁶ The permanent injunction is currently still in place as the new policies are being implemented.³³⁷

The same month that the DOJ filed a statement of interest in the *Coleman* litigation, a class of juvenile offenders with disabilities in California filed a disability rights case against Contra Costa County. In the resulting litigation, *G.F. v. Contra Costa County*,³³⁸ the class alleged that the Contra Costa County Juvenile Hall was “subjecting youth with

(discussing the *Coleman* and *Plata* litigation in-depth).

331. *Coleman v. Wilson*, 912 F. Supp. 1282, 1311 (E.D. Cal. 1995).

332. *Coleman* Post-Trial Brief, *supra* note 280, at 1.

333. *See* *Coleman* Statement of Interest, *supra* note 324, at 2.

334. Plaintiffs’ Reply in Support of Motion for Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation at 3, *Coleman v. Brown*, No. 2:90-cv-00520-LKK-JFM (E.D. Cal. Aug. 23, 2013) [hereinafter *Coleman* Plaintiffs’ Reply].

335. *See* Erica Goode, *California Revises Rules Covering the Use of Force on Mentally Ill Inmates*, N.Y. TIMES, Aug. 3, 2014, at A22; Stanton & Walsh, *supra* note 328.

336. Stanton & Walsh, *supra* note 328.

337. *Coleman v. Brown*, No. CIV. S-90-520 LKK/DAD (PC), at 4–5 (E.D. Cal. Aug. 29, 2014).

338. *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667 (N.D. Cal. Aug. 8, 2013).

disabilities to unconscionable conditions of solitary confinement based on their disability-related behavior—sometimes for weeks or months at a time—while watching them deteriorate mentally.”³³⁹ Members of the class alleged that they were placed and kept in isolation for behaviors directly related to the manifestation of their mental illnesses, including spitting, talking to themselves, laughing inappropriately, and facial twitching.³⁴⁰ The use of solitary confinement at the Juvenile Hall resulted in hundreds of hours of missed classroom time, violating federally and state mandated access to education.³⁴¹ As it did in the *Coleman* litigation, the DOJ filed a statement of interest laying out its interpretation of the ADA and specifically asking the court to deny the defendant’s motion to dismiss.³⁴² As of April 2015, the case is in ongoing settlement hearings.³⁴³

In 2012, the Denver Civil Rights Clinic at the University of Denver Sturm College of Law, which filed the *Anderson* case, filed another case against the Colorado Department of Corrections (CDOC) on behalf of mentally ill inmate James Sardakowski.³⁴⁴ The Clinic’s theory of the case was similar to the “reasonable modification” theory advanced in *Anderson*.³⁴⁵ Sardakowski is a diagnosed schizophrenic who has been incarcerated by the CDOC since 2006 and in solitary confinement at the Colorado State Penitentiary (CSP) since 2009.³⁴⁶ He was placed in solitary confinement after being taken off of his medication for “cheeking” (not swallowing) it and for banging his head against a wall.³⁴⁷

Sardakowski is currently under extremely restrictive conditions of confinement at CSP. He is allowed two books that can be exchanged once a year,³⁴⁸ and can leave his cell for only one hour a day to shower and exercise in the indoor recreation room.³⁴⁹ He cannot complete the

339. Class Action First Amended Class Action Complaint for Injunctive and Declaratory Relief at 2, *G.F. v. Contra Costa Cnty.*, No. C13-3667-SBA (N.D. Cal. Dec. 24, 2013), ECF No. 87.

340. *See* *Contra Costa County Statement of Interest*, *supra* note 326, at 5.

341. *Id.* at 1.

342. *Id.* at 13.

343. Minute Entry, *G.F. v. Contra Costa Cnty.*, No. 3:13-cv-03667-MEJ (N.D. Cal. Mar. 31, 2015) (docket) (showing the last entry on the docket as of May 5, 2015 as a minute entry regarding a settlement conference).

344. Sardakowski Complaint, *supra* note 280.

345. *See id.* at 32–36.

346. *Id.* at 6, 10.

347. *Id.* at 9–10.

348. *Id.* at 11.

349. *Id.*

“leveling out” program that would place him back in general population because his “mental illness prevents him from meeting the behavior-based requirements for long periods of time.”³⁵⁰ Sardakowski’s failure to meet these requirements include repeated incidences of self-harm, such as hitting his head against the wall, biting his hands until they bleed, and attempting self-castration.³⁵¹ When Sardakowski self-harms, staff chain him to a bed and put him in a motorcycle helmet and diaper for days at a time.³⁵² In the complaint filed on behalf of Sardakowski, the Clinic alleged that this treatment violates both the Eighth Amendment as well as the disability rights statutes.³⁵³ Specifically, the Clinic alleged that CDOC was not providing Sardakowski with an alternative means of completing the “leveling out” program—which he must complete to be released from solitary confinement—and that this failure to make reasonable accommodations constitutes discrimination.³⁵⁴ As of April 2015 the *Sardakowski* case, like *Contra Costa County*, is in settlement proceedings.³⁵⁵

III. TEAR DOWN THAT WALL: PROPOSALS FOR FUTURE TEST CASES

*I don't feel like I have control over my behavior. My behavior is randomly picked. If I feel upset then I act out behaviorally It's worse in ad seg [administrative segregation], because I can't walk away from the situation to try to think rationally. You build up a lot of stress that you can't release In [general population] I could get to the point where I could think about my actions, but here, what do I have? I can stand at the door, then walk back to my bunk.*³⁵⁶

—James Sardakowski, the plaintiff in *Sardakowski v. Clements*³⁵⁷

Although courts have been reluctant to acknowledge that the solitary

350. *Id.* at 12.

351. *See Hearing on Reassessing Solitary Confinement II*, *supra* note 25, at 4.

352. *Id.* at 5–6.

353. Sardakowski Complaint, *supra* note 280.

354. *Id.*

355. Minute Entry, *Sardakowski v. Clements*, No. 1:12-cv-01326-RBJ-KLM (D. Colo. Dec. 16, 2014) (docket) (showing the last entry on the docket as of May 5, 2015 to be a minute entry regarding a settlement conference).

356. *See Hearing on Reassessing Solitary Confinement II*, *supra* note 25, at 7–8.

357. *See supra* Part II.C.3.

confinement of mentally ill inmates violates the disability rights statutes, a plain reading of the language of both the ADA and the Rehabilitation Act strongly indicates that these statutes provide mentally ill inmates a viable cause of action against their isolation.³⁵⁸ Mental illness qualifies as a disability under the ADA when it substantially interferes with the major life activities of communicating, concentrating, learning, sleeping, and possibly interacting with others.³⁵⁹ Inmates with disabling mental illness cannot be excluded from prison “services, programs and activities” on the basis of their disability, or otherwise be subjected to discrimination by correctional facilities.³⁶⁰ Because inmates with mental illness are often placed in solitary confinement for behavior relating to their disability—and are subsequently excluded from participation in prison services, programs, and activities while in isolation—these widespread practices violate the disability rights statutes. Even if there is a valid safety rationale for isolating a mentally ill inmate, correctional facilities must still provide benefits and services that are equal to that of the general prison population.³⁶¹

There are three distinct ways in which corrections facilities violate the rights of mentally ill inmates with regard to the use of solitary confinement: (1) by segregating mentally ill inmates from the general prison population through the use of solitary confinement; (2) by prolonging the isolation of inmates due to their manifesting mental deterioration and failing to provide reasonable accommodations for the “step-down” programs that would release them into the general prison population; and (3) by failing to reasonably modify the conditions of solitary confinement for those mentally ill inmates who present a safety risk, including providing them with equal benefits and services while in isolation. The following analysis will discuss each of these legal theories in turn.

A. *Segregating Mentally Ill Inmates Because of Their Mental Illness Violates the Disability Rights Statutes*

As recognized by the DOJ and subsequently argued by the plaintiffs

358. See *supra* Part II.A.

359. *Id.*

360. 28 C.F.R. § 35.130(d) (2014). The Rehabilitation Act provides similar protections against discrimination by “any program or activity receiving Federal financial assistance.” See 29 U.S.C. § 794(a) (2012).

361. 28 C.F.R. § 35.130(b)(iv); see also Letter from Thomas E. Perez, *supra* note 32, at 37.

in the *Coleman*³⁶² and *Contra Costa County*³⁶³ litigations, corrections facilities violate the disability rights statutes when they segregate mentally ill inmates without valid safety justifications.³⁶⁴ It is usually *because* mentally ill inmates have difficulty with the major life activities of communicating, concentrating, and interacting with others that they end up in solitary confinement.³⁶⁵ These inmates often find it difficult to “follow straightforward routine orders to sit down, to come out of a cell, to stand up for the count, to remove clothes from cell bars, or to take showers.”³⁶⁶ As a result, mentally ill inmates are disproportionately and unjustly punished by placement in isolation.³⁶⁷

This unjustified segregation violates Title II of the ADA, which states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or subjected to discrimination by any such entity.”³⁶⁸ Section 504 of the Rehabilitation Act employs similar language.³⁶⁹ As the Supreme Court held in *Yeskey*, almost every aspect of prison life is a “service, program, or activity,”³⁷⁰ including “classification, housing, recreation, and medical and mental health treatment . . . for which prisoners are otherwise qualified.”³⁷¹ Recognizing that “historically, society has tended to isolate and segregate individuals with disabilities,”³⁷² Title II additionally requires that these prison services, programs, and activities be administered in

362. *Coleman* Post-Trial Brief, *supra* note 280, at 15 (“By warehousing class members in segregation units because appropriate beds and timely transfers cannot be provided, Defendants’ system fails to make the reasonable accommodations necessary for mentally ill prisoners to be housed and treated in the most integrated setting appropriate to their individual needs.”).

363. G.F. Complaint for Injunctive and Declaratory Relief, *supra* note 280, at 36 (alleging that defendants violated the ADA by “locking Plaintiffs and members of the Plaintiff class in solitary confinement due to their disabilities thereby excluding them from Defendants’ educational and rehabilitative programs, services and activities”).

364. *See* Letter from Thomas E. Perez, *supra* note 32.

365. *See* HUMAN RIGHTS WATCH, ILL-EQUIPPED, *supra* note 19, at 59.

366. *Id.*

367. *Id.* at 59–60 (citing various studies, including a Washington State study that showed that while mentally ill inmates make up 18.7% of the prison population, they represent 41% of infractions); *id.* at 147–49 (describing the disproportionate numbers of mentally ill inmates placed in solitary by state correctional systems and individual institutions in Oregon, New York, California, New Jersey, Indiana, Washington, Iowa, and Pennsylvania).

368. 42 U.S.C. § 12132 (2012).

369. 29 U.S.C. § 794(a) (2012).

370. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 211 (1998).

371. *See* Letter from Thomas E. Perez, *supra* note 32, at 32 (citing *Yeskey*, 524 U.S. at 211).

372. 42 U.S.C. § 12101(a)(2).

“the most integrated setting appropriate.”³⁷³ Mentally ill inmates that are placed in segregation for their inability to comply with prison rules are therefore excluded in isolation by reason of their disability from services, programs, and activities available to the general prison population.

While plaintiffs filing employment discrimination claims under Title I must demonstrate causation between their disability and the allegedly discriminatory employer action,³⁷⁴ plaintiffs filing Title II claims appear to enjoy a lower causal burden in proving that their exclusion or denial of a benefit is “by reason of such disability.”³⁷⁵ In *Olmstead*, the State of Georgia argued that the plaintiffs were denied community placement due to lack of funding, not disability discrimination.³⁷⁶ The State further argued that there was no discrimination “because “discrimination” necessarily requires uneven treatment of similarly situated individuals,” and [the plaintiffs] had identified no comparison class, *i.e.*, no similarly situated individuals given preferential treatment.”³⁷⁷ The Supreme Court rejected the State’s arguments, stating that “[w]e are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.”³⁷⁸ Under *Olmstead*’s reasoning, discriminatory segregation does not always have to be purposeful to violate the disability discrimination statutes.³⁷⁹ The Supreme Court has further recognized that “both disparate-treatment and disparate-impact claims are cognizable under the ADA.”³⁸⁰ Because most facilities house a disproportionate number of mentally ill inmates in solitary

373. 28 C.F.R. § 35.130(d) (2014).

374. See, e.g., Lisa Schlesinger, *The Social Model’s Case for Inclusion: “Motivating Factor” and “But For” Standards of Proof Under the Americans With Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities*, 35 CARDOZO L. REV. 2115, 2125–28 (2014) (discussing the current circuit split on causation standards of proof).

375. 42 U.S.C. § 12132; see, e.g., BLANCK ET AL., *supra* note 175, at 410–13 (parsing interpretations of “by reason of such disability” under 42 U.S.C § 12132).

376. *Olmstead v. L.C.*, 527 U.S. 581, 594 (1999).

377. *Id.* at 598.

378. *Id. Contra id.* at 626 (Thomas, J., dissenting) (“We have previously interpreted the phrase ‘by reason of’ as requiring proximate causation. . . . Such an interpretation is in keeping with the vernacular understanding of the phrase. . . . This statute should be read as requiring proximate causation as well.”).

379. See, e.g., Stiles I, No. 8:12–cv–02375–T–27EAJ, 2013 WL 6185404, at *2 (M.D. Fla. Nov. 25, 2013) (applying *Olmstead*’s reasoning to the ADA claims of a survivor of a prisoner who committed suicide in isolation and finding that the complaint sufficiently alleged that the isolation was a violation of Title II; this case was later settled).

380. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

confinement,³⁸¹ this disparate impact alone may be enough to demonstrate a violation of the ADA.³⁸² Future test cases should capitalize on this advantage by bringing ADA claims to challenge the unjustified segregation of mentally ill inmates.

B. *Prolonging Inmates' Isolation Due to Their Mental Deterioration is Also Discrimination Under the Disability Rights Statutes*

*There was only one catch and that was Catch-22 Orr would be crazy to fly more missions and sane if he didn't, but if he was sane, he had to fly them. If he flew them, he was crazy and didn't have to; but if he didn't want to he was sane and had to.*³⁸³

—A description of the infamously paradoxical rule from *Catch-22* by Joseph Heller

Sam Mandez was not placed in solitary confinement because of his mental illness. In fact, Mandez was, by all accounts, mentally healthy before his placement in isolation.³⁸⁴ However, CSP continued to prolong Mandez's solitary sentence indefinitely because he developed severe mental illness while in solitary confinement, which caused him to act out³⁸⁵ and self-harm.³⁸⁶ Mandez was even disciplined for a suicide attempt, which the prison claimed was "abusing medical treatment."³⁸⁷ This is despite the fact that an evaluating psychiatrist determined that Mandez's indefinite isolation was contributing to his mental decomposition and that he was unlikely to improve in solitary confinement.³⁸⁸ Mandez's isolation-induced mental illness thwarted his ability to conform his behavior to the program requirements that would have allowed him to work his way out of solitary confinement.³⁸⁹

381. See, e.g., *supra* Part I.B.

382. See, e.g., John F. Cockrell, *Solitary Confinement: The Law Today and the Way Forward*, 37 L. & PSYCHOL. REV. 211, 223–25 (2013) (arguing that inmates with mental illness in supermaxes should bring disparate impact claims under the ADA).

383. JOSEPH HELLER, CATCH-22 55 (1961). A "catch-22" has come to mean "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule." *Catch-22 Definition*, MERRIAM-WEBSTER DICTIONARY, [http://www.merriam-webster.com/dictionary/catch 22](http://www.merriam-webster.com/dictionary/catch%2022) (last visited Feb. 4, 2015).

384. See Cohen, *supra* note 2.

385. See *id.* (describing Mandez's assaults on staff).

386. ACLU of Colo., *supra* note 10, at 16:41.

387. *Id.*

388. See ACLU OF COLORADO, *supra* note 5, at 8.

389. *Id.*

The ADA and Rehabilitation Act both offer protections as soon as a disabling mental illness manifests, regardless of whether an inmate has no history of or predisposition to mental illness.³⁹⁰ As previously discussed, solitary confinement has been shown to foster mental illness in mentally healthy inmates—like Sam Mandez—and to exacerbate existing mental illness.³⁹¹ Regardless of when their illness began, inmates with mental illness severe enough to interfere with their ability to communicate, concentrate, learn, sleep, or perform “major life activities” qualify as “disabled” under the definitions of the disability rights statutes.³⁹² When prisons extend inmates’ solitary sentences because of their manifesting mental illness, these prisons are in clear violation of Title II of the ADA and Section 504 of the Rehabilitation Act.

As documented in Mandez’s case and in the *Anderson* and *Sardakowski* litigations, many prisons refuse to allow an inmate to “graduate” from solitary confinement “step-down” programs solely due to the manifestations of their illnesses.³⁹³ Manifestations that are deemed worthy of punishment include attempts at self-harm or suicide,³⁹⁴ as well as “complaining to staff,” and “bad attitude[s] at count.”³⁹⁵ Correctional

390. The disability rights statutes are largely silent with regard to time requirements for qualifying disabilities, implying that protections are triggered at the moment of manifestation. *See* 42 U.S.C. § 12102 (2012); 28 C.F.R. § 35.104 (2014). As previously explained, disability has three definitions under the ADA: (1) “a physical or mental impairment that substantially limits one or more major life activities,” (2) “a record of such impairment,” or (3) “being regarded as having such an impairment.” 42 U.S.C. § 12102(1). The statutes are silent as to duration requirements as to the first two definitions. However, individuals who are “regarded as” having a disability (whether that disability is “actual or perceived”) only qualify for protection under the ADA if the actual or perceived disability is not “transitory and minor.” Transitory disabilities are defined as having “an actual or expected duration of 6 months or less.” 42 U.S.C. § 12102(3)(B). Despite this caveat, most of the inmates in solitary confinement are truly mentally ill and therefore qualify for protection under 42 U.S.C. § 12102(1)(A) (defining disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual.”).

391. *See supra* Part I.B.

392. ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § (3)(1)(A), 122 Stat. 3553, 3555; *see also supra* Part II.A, which discusses the elements of a successful ADA claim against a jail or prison.

393. *See, e.g.,* METCALF ET AL., *supra* note 25, at 18; Sardawski Complaint, *supra* note 280; Anderson Complaint, *supra* note 284, at 4; Cohen, *supra* note 2.

394. *See, e.g.,* U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS, INMATE DISCIPLINE PROGRAM 46–49 (2011) (listing “self-mutilation” as a “High Severity Level Prohibited Act” and recommending a variety of punishments, including six months of disciplinary segregation); *see also* Andrew Cohen, *Should Mentally Ill Federal Prisoners Be Punished for Suicide Attempts?*, THE ATLANTIC (Apr. 1, 2013, 9:13 AM), <http://www.theatlantic.com/national/archive/2013/04/should-mentally-ill-federal-prisoners-be-punished-for-suicide-attempts/274313/>.

395. *See* Anderson Complaint, *supra* note 284, at 27 (“According to Mr. Anderson’s Class Review he has received negative chrons, and is being retained in administrative segregation, for

facilities are required to make “reasonable modifications in policies, practices, or procedures” to avoid discriminating on the basis of disability.³⁹⁶ Prisons therefore arguably fail to make “reasonable modifications” to these punishment schemes when they make it impossible for mentally ill inmates to “earn” their way out of solitary confinement.³⁹⁷ As a result, these punishment schemes become cyclical for many mentally ill inmates and a violation of the disability rights statutes.

C. Failure to Provide Mentally Ill Inmates in Isolation Access to Equal Aids, Benefits, and Services Violates the Disability Rights Statutes

As exemplified in the *Anderson* case, sometimes there are valid safety reasons to isolate mentally ill prisoners from the general prison population.³⁹⁸ Anderson himself “believed there was a legitimate reason” for keeping him in solitary confinement, including the risk that he would “act out impulsively and violently.”³⁹⁹ There are two safety exceptions enumerated in the ADA regulations.⁴⁰⁰ The first states that prisons “may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities.”⁴⁰¹ The second states that prisons are not required “to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.”⁴⁰² However, correctional facilities must perform an individualized assessment applying the *Arline* factors to substantiate a claim of a direct threat, determining the exact nature, duration, severity, and probability of harm.⁴⁰³ Facilities also assess whether reasonable

incidents with no explanation other than ‘complaining to staff’ and ‘bad attitude at count.’”).

396. 28 C.F.R. § 35.130(b)(7) (2014).

397. See, e.g., Cohen, *supra* note 2 (describing how prison officials have justified Mandez’s continued isolation because it is “necessary to protect prison staff from his frequent outbursts”); MARK W. DIAMOND, SAMUEL VICTORIO MANDEZ 8–9 (Feb. 13, 2012), available at <http://www.scribd.com/doc/182916318/Dr-Diamond-Report-pdf> (finding in an independent psychiatric evaluation that Sam Mandez was not culpable for assaults on staff due to his mental illness).

398. See Glidden & Rovner, *supra* note 27, at 69–70.

399. *Id.*

400. 28 C.F.R. § 35.130(h); *id.* § 35.139(a).

401. *Id.* § 35.130(h).

402. *Id.* § 35.139(a).

403. Sch. Bd. of Nassau Cnty. v. Arline, 480 U.S. 273, 287–88 (1987); 28 C.F.R. § 35.139(b).

modifications will “mitigate the risk” of injury.⁴⁰⁴

Even if reasonable modifications cannot mitigate the risk of an inmate in the general population, prisons must still provide mentally ill inmates who are isolated for safety reasons access to aids, benefits, and services that are the same or “equal to that afforded” prisoners in the general population.⁴⁰⁵ For example, in the *Anderson* litigation, Anderson’s attorneys argued that the denial of specific services—including books, education, and outdoor exercise—served no safety purpose and was therefore discriminatory.⁴⁰⁶ They theorized that this would shift the burden of an affirmative defense to the prison to demonstrate that providing these services to isolated inmates would be a “fundamental alteration” of the prison’s service, program, or activity.⁴⁰⁷ This would then “force[] an articulation of the reason for the particular condition.”⁴⁰⁸ This piecemeal approach could ultimately remove many of the punitive aspects of isolation that are so detrimental to the mental health of inmates.⁴⁰⁹

The American Bar Association (ABA) has made recommendations that could potentially satisfy the ADA’s requirement that prisons provide isolated, mentally ill inmates with equal access to aids, benefits, and services.⁴¹⁰ These recommendations include in-cell programming, more out-of-cell time, face-to-face interaction with staff, and access to phone calls and reading material.⁴¹¹ Mississippi, in particular, has found excellent success with removing mentally ill inmates from super-maximum isolation in the Mississippi State Penitentiary at Parchman and placing these inmates in mental health step-down units.⁴¹² These

404. 28 C.F.R. § 35.139(b).

405. See 28 C.F.R. § 35.130(b)(i)–(ii); Letter from Thomas E. Perez, *supra* note 32, at 37 (“For those prisoners with serious mental illness or intellectual disabilities who cannot be integrated into the general population, the Facility still has an obligation to provide the prisoners with the opportunity to participate in and benefit from mental health services and activities, and other services, programs, and activities to which prisoners without disabilities have access.” (internal citations omitted)).

406. See Glidden & Rovner, *supra* note 27, at 70.

407. *Id.* at 68–69; see also HARRINGTON, *supra* note 226, at *11 (“One might also argue that the ADA mandate has removed from officers the ability to plead they did not know any better; the ADA sets on them an affirmative requirement to act appropriately with respect to prisoners with mental disabilities.”).

408. See Glidden & Rovner, *supra* note 27, at 69.

409. See, e.g., *id.* at 70.

410. See ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS, Standards 23-3.7, 23-3.8 (3d ed. 2011).

411. *Id.*

412. See Kupers et al., *supra* note 90, at 1042–43.

units accept those inmates with the “greatest impairment in functioning,” as well as those who repeatedly self-harm.⁴¹³ This particular step-down program focuses on treatment, providing group treatment from highly trained staff and peer-facilitated programming.⁴¹⁴ The program has been overwhelmingly successful, resulting in a seventy percent drop in serious incidences between prisoners, as well as between staff and prisoners.⁴¹⁵ Even though these prisoners may have initially required isolation for safety purposes, the ABA and Mississippi approaches refocus the conditions of isolation and the purposes of step-down programs on rehabilitation as opposed to punishment, thus bringing solitary confinement conditions into compliance with the ADA. Future test cases challenging the lack of aids, benefits, and services for mentally ill inmates in solitary confinement may be able to draw on these examples when considering alternatives to complete isolation.

CONCLUSION

At the writing of this Comment, the tide is slowly beginning to turn against the widespread use of solitary confinement in our nation’s prisons. In addition to the DOJ’s efforts and nascent ADA litigation, state prisons and legislatures are beginning to examine the practical sustainability of solitary confinement. In February 2014, the new head of the Colorado Department of Corrections spent a night in solitary confinement at a Colorado state penitentiary and described it as “a dumping ground for the mentally ill.”⁴¹⁶ Under his watch, the Department has vowed to remove all inmates with “major” mental illness from administrative segregation.⁴¹⁷ New York State has instituted reforms on the use of solitary confinement, including setting a cap on the time inmates can spend in isolation and diverting mentally ill inmates from solitary to mental health services.⁴¹⁸ Maine and Mississippi have also reduced their use of solitary confinement.⁴¹⁹ In Texas, the prison guard union has taken it upon itself to advocate for an end to solitary

413. *Id.* at 1042.

414. *Id.* at 1042–43.

415. *Id.* at 1043.

416. Raemisch, *supra* note 96, at A25.

417. Memorandum from Lou Archuleta, Interim Dir. of Prisons, to Wardens, Offender Servs. (Dec. 10, 2013), available at <http://aclu-co.org/wp-content/uploads/files/Memo%20Mental%20Health%20Qualifiers%20Ad%20Seg%20MEMO%20%282%29.pdf>.

418. *New York Rethinks Solitary Confinement*, N.Y. TIMES, Feb. 21, 2014, at A24.

419. *Id.*

confinement on death row.⁴²⁰

However, the solitary confinement of the mentally ill is still widespread and much work remains to be done to reform its use. This Comment has provided an overview of solitary confinement, the psychological impact of isolation, and the issues presented by a typical constitutional challenge to solitary confinement conditions under the Eighth Amendment. It has also argued that the ADA and the Rehabilitation Act currently provide additional, and in some respects, stronger protections than the Constitution for mentally ill inmates in solitary confinement. Lastly, it has demonstrated that these protections extend in three distinct situations: when inmates are segregated because of their mental illness; when their isolation is prolonged on the basis of mental illness; and when correctional facilities fail to provide isolated, mentally ill inmates equal access to aids, benefits, or services provided to the general prison population. Recognizing that these common prison practices constitute discrimination under the disability rights statutes will provide a much-needed remedy for mentally ill inmates who continue to languish in our nation's solitary confinement cells.

420. Alex Hannaford, *Prison Guard Union Calls on Texas to Curtail Solitary Confinement on Death Row*, TEX. OBSERVER (Jan. 28, 2014), <http://www.texasobserver.org/texas-prison-guard-union-calls-curtailment-solitary-confinement-death-row/>.